

B 2
STORAGE

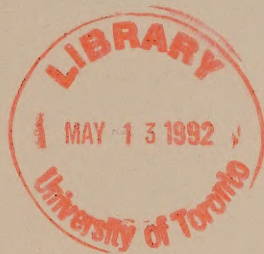


Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761114680051>

CA20N
LR
- 054

ONTARIO LABOUR RELATIONS BOARD REPORTS



January 1992



ONTARIO LABOUR RELATIONS BOARD

<i>Chair</i>	M.G. MITCHNICK
<i>Alternate Chair</i>	R.O. MACDOWELL
<i>Vice-Chairs</i>	M. BENDEL
	J.B. BLOCH
	L. DAVIE
	N.V. DISSANAYAKE
	O.V. GRAY
	B. HERLICH
	R.J. HERMAN
	R.D. HOWE
	J. JOHNSTON
	B. KELLER
	P. KNOPF
	S. LIANG
	J. McCORMACK
	M.A. NAIRN
	K. O'NEIL
	K. PETRYSHEN
	N.B. SATTERFIELD
	I.M. STAMP
	G. SURDYKOWSKI
	S.A. TACON

Members

J. ANDERSON	J.W. MURRAY
B.L. ARMSTRONG	W.S. O'NEILL
C.A. BALLENTINE	D.A. PATTERSON
W.A. CORRELL	H. PEACOCK
K.S. DAVIES	R.W. PIRRIE
A.R. FOUCAULT	F.B. REAUME
W.N. FRASER	J. REDSHAW
P.V. GRASSO	K.V. ROGERS
A. HERSHKOVITZ	J.A. RONSON
M. JONES	M.A. ROSS
F. KELLY	J.A. RUNDLE
J. KENNEDY	G.O. SHAMANSKI
H. KOBRYN	R.M. SLOAN
J. KURCHAK	E.G. THEOBALD
J. LEAR	J. TRIM
D.A. MacDONALD	M. VUKOBRAT
W.J. McCARRON	S. WESLAK
C. McDONALD	W.H. WIGHTMAN
R.D. McMURDO	N.A. WILSON
R.R. MONTAGUE	D.G. WOZNIAK

<i>Registrar</i>	T.A. INNISS
<i>Board Solicitors</i>	K. HEWSON
	R. LEBI
	K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1992] OLRB REP. JANUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1.	Acme Plumbing & Heating, Vincent J. Trudeau & Sons Inc. c.o.b. as, and 883553 Ontario Inc. c.o.b. as Acme Bivalent Systems; Re U.A., Local 463	1
2.	Adam Clark Company Ltd., I.B.E.W., Local 350 and; Re L.I.U.N.A., Local 1089	6
3.	Arosan Enterprises Limited; Re C.J.A., Local 93.....	10
4.	Belair Restoration (Ontario) Inc., Belair Restoration (Ottawa); Re O.P.C.M., Local Union 172 Restoration Steeplejacks.....	13
5.	Burns International Security Services Limited; Re U.P.G.W.A.	15
6.	Craig, Tanya; Re Aluminum, Brick and Glass Workers International Union, Local 203, and Consumers Glass	16
7.	E.S. Fox Limited; Re Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007	29
8.	MacMillan Bathurst Inc.; Re Reg Bell; Re C.P.U., Local 1199.....	41
9.	Ontario Hydro, Electrical Power Systems Construction Association; Re Ontario Allied Construction Trades Council, O.P.C.M., Local 598; Re L.I.U.N.A., Local 1059, Ontario Provincial District Council and its affiliated Local Unions.....	47
10.	Otis Elevator Co.; Re I.U.E.C., Local 50	61
11.	Steds Limited; Re L.I.U.N.A., Local 493	67
12.	Township of Matchedash Council, The; Re Ronald Gerald Tisler	87
13.	Turn-Key Installations Inc.; Re U.A., Local 463; Re Group of Employees	90
14.	Weatherstrong Building Products Ltd.; Re U.S.W.A.; Re Group of Employees.....	100
15.	Wm. J. Davidson Electric Inc.; Re I.B.E.W., Local 105	101

SUBJECT INDEX

- Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer submitting that grievance ought to be dismissed for reasons of delay, prejudice suffered as a result of such delay and that doctrine of laches applying - Employer also submitting that union's bargaining rights abandoned - Employer not suffering the prejudice asserted and Board finding no abandonment - Board finding union estopped from asserting its rights pursuant to ICI agreement, but not determining length of estoppel - Grievance dismissed
STEDS LIMITED; RE L.I.U.N.A., LOCAL 493 67
- Adjournment - Construction Industry - Practice and Procedure - Related Employer - Board denying adjournment request made because respondents attempted to retain counsel virtually at last minute - Whether respondent companies engaged in related activities - But for "plumbing" work, activities of the two companies identical - Board holding that merely because a very small part of the work performed by the second respondent would be covered by the collective agreement with the first respondent not sufficient reason to deny union its remedy - Declaration issuing
ACME PLUMBING & HEATING, VINCENT J. TRUDEAU & SONS INC. C.O.B. AS, AND 883553 ONTARIO INC. C.O.B. AS ACME BIVALENT SYSTEMS; RE U.A., LOCAL 463 1
- Bargaining Rights - Abandonment - Construction Industry - Construction Industry Grievance - Employer submitting that grievance ought to be dismissed for reasons of delay, prejudice suffered as a result of such delay and that doctrine of laches applying - Employer also submitting that union's bargaining rights abandoned - Employer not suffering the prejudice asserted and Board finding no abandonment - Board finding union estopped from asserting its rights pursuant to ICI agreement, but not determining length of estoppel - Grievance dismissed
STEDS LIMITED; RE L.I.U.N.A., LOCAL 493 67
- Bargaining Rights - Bargaining Unit - Certification - Construction Industry - Natural Justice - Reconsideration - Employer submitting that Board's decision in *O.J. Pipelines* incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed
TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES 90
- Bargaining Unit - Bargaining Rights - Certification - Construction Industry - Natural Justice - Reconsideration - Employer submitting that Board's decision in *O.J. Pipelines* incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed
TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES 90

Certification - Bargaining Rights - Bargaining Unit - Construction Industry - Natural Justice - Reconsideration - Employer submitting that Board's decision in <i>O.J. Pipelines</i> incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES	90
Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105	101
Certification - Charges - Practice and Procedure - Inquiry into non-pay allegation disclosing loan by fellow employee and repayment - Board seeing no reason to direct hearing into allegation - Board to dispose of certification application without further notice unless it receives submissions from any party showing why the Board should hold a hearing into the allegation BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE U.P.G.W.A.	15
Certification - Construction Industry - Board dismissing union's certification application in accordance with Practice Note #7, but declining employer's request to impose 6 month bar on future applications for certification BELAIR RESTORATION (ONTARIO) INC., BELAIR RESTORATION (OTTAWA); RE O.P.C.M., LOCAL UNION 172 RESTORATION STEEPLEJACKS	13
Certification - Parties - Practice and Procedure - Unfair Labour Practice - Carpenters' union applying for certification and filing unfair labour practice complaint - Labourers' union seeking to intervene on ground that remedy sought under complaint would have effect of displacing member of Labourers - Labourers also submitting that Board finding might affect outcome of grievance earlier filed by Labourers - Labourers' interest contingent on various factors - Board denying Labourers standing on adjudication of merits of complaint - Labourers, however, to be given notice of any subsequent hearing to deal with remedy and to have opportunity to show why they should be granted standing for that hearing AROSAN ENTERPRISES LIMITED; RE C.J.A., LOCAL 93.....	10
Certification - Representation Vote - Settlement - Unfair Labour Practice - Parties' settlement of certification application and related unfair labour practice complaint requiring Board to conduct representation vote - Board seeing no reason not to act on that agreement of the parties - Board directing representation vote WEATHERSTRONG BUILDING PRODUCTS LTD.; RE U.S.W.A.; RE GROUP OF EMPLOYEES	100
Certification Where Act Contravened - Certification - Construction Industry - Discharge - Discharge for Union Activity - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105	101

Charges - Certification - Practice and Procedure - Inquiry into non-pay allegation disclosing loan by fellow employee and repayment - Board seeing no reason to direct hearing into allegation - Board to dispose of certification application without further notice unless it receives submissions from any party showing why the Board should hold a hearing into the allegation	
BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE U.P.G.W.A.	15
Construction Industry - Abandonment - Bargaining Rights - Construction Industry Grievance - Employer submitting that grievance ought to be dismissed for reasons of delay, prejudice suffered as a result of such delay and that doctrine of laches applying - Employer also submitting that union's bargaining rights abandoned - Employer not suffering the prejudice asserted and Board finding no abandonment - Board finding union estopped from asserting its rights pursuant to ICI agreement, but not determining length of estoppel - Grievance dismissed	
STEDS LIMITED; RE L.I.U.N.A., LOCAL 493	67
Construction Industry - Adjournment - Practice and Procedure - Related Employer - Board denying adjournment request made because respondents attempted to retain counsel virtually at last minute - Whether respondent companies engaged in related activities - But for "plumbing" work, activities of the two companies identical - Board holding that merely because a very small part of the work performed by the second respondent would be covered by the collective agreement with the first respondent not sufficient reason to deny union its remedy - Declaration issuing	
ACME PLUMBING & HEATING, VINCENT J. TRUDEAU & SONS INC. C.O.B. AS, AND 883553 ONTARIO INC. C.O.B. AS ACME BIVALENT SYSTEMS; RE U.A., LOCAL 463	1
Construction Industry - Bargaining Rights - Bargaining Unit - Certification - Natural Justice - Reconsideration - Employer submitting that Board's decision in <i>O.J. Pipelines</i> incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed	
TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES	90
Construction Industry - Certification - Board dismissing union's certification application in accordance with Practice Note #7, but declining employer's request to impose 6 month bar on future applications for certification	
BELAIR RESTORATION (ONTARIO) INC., BELAIR RESTORATION (OTTAWA); RE O.P.C.M., LOCAL UNION 172 RESTORATION STEEPLEJACKS	13
Construction Industry - Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing	
WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105	101
Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Practice and Procedure - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in	

IV

complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers' strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS

47

Construction Industry - Construction Industry Grievance - Settlement - Labour-Management Relations Committee hearing grievance at Step 3 of grievance procedure and issuing decision - Union submitting that matter in dispute thereby settled pursuant to grievance procedure set out in collective agreement - Board upholding union's preliminary motion, concluding that grievance settled, and directing employer to comply with terms of settlement

E.S. FOX LIMITED; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007

29

Construction Industry - Construction Industry Grievance - Whether attending training course just outside Metro boundaries, as required by employer, entitling grievors to travel allowance under collective agreement - Board rejecting employer's distinction between assigning duties and assigning work - Employees entitled to travel allowance - Grievance allowed

OTIS ELEVATOR CO.; RE I.U.E.C., LOCAL 50

61

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Parties requesting that Board decide, as preliminary matter, scope of relevant past practice evidence with respect to disputed work - Board ruling that evidence should be restricted to ICI sector and to precast concrete ducts (as opposed to all conduit duct banks)

ADAM CLARK COMPANY LTD., I.B.E.W., LOCAL 350 AND; RE L.I.U.N.A., LOCAL 1089.....

6

Construction Industry Grievance - Abandonment - Bargaining Rights - Construction Industry - Employer submitting that grievance ought to be dismissed for reasons of delay, prejudice suffered as a result of such delay and that doctrine of laches applying - Employer also submitting that union's bargaining rights abandoned - Employer not suffering the prejudice asserted and Board finding no abandonment - Board finding union estopped from asserting its rights pursuant to ICI agreement, but not determining length of estoppel - Grievance dismissed

STEDS LIMITED; RE L.I.U.N.A., LOCAL 493

67

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Parties - Practice and Procedure - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not

determining Labourers' strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS

47

Construction Industry Grievance - Construction Industry - Settlement - Labour-Management Relations Committee hearing grievance at Step 3 of grievance procedure and issuing decision - Union submitting that matter in dispute thereby settled pursuant to grievance procedure set out in collective agreement - Board upholding union's preliminary motion, concluding that grievance settled, and directing employer to comply with terms of settlement

E.S. FOX LIMITED; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007

29

Construction Industry Grievance - Construction Industry - Whether attending training course just outside Metro boundaries, as required by employer, entitling grievors to travel allowance under collective agreement - Board rejecting employer's distinction between assigning duties and assigning work - Employees entitled to travel allowance - Grievance allowed

OTIS ELEVATOR CO.; RE I.U.E.C., LOCAL 50

61

Discharge - Certification - Certification Where Act Contravened - Construction Industry - Discharge for Union Activity - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing

WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105

101

Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Unfair Labour Practice - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld

CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS

16

Discharge - Health and Safety - Deputy fire chief of volunteer fire department alleging that he was removed from his position for acting in compliance with, and seeking enforcement of, *Occupational Health and Safety Act* - Board determining that town council not motivated by anti-safety animus - Complaint dismissed

TOWNSHIP OF MATCHEDASH COUNCIL, THE; RE RONALD GERALD TISLER .

87

Discharge for Union Activity - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing

WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105

101

Duty of Fair Representation - Discharge - Evidence - Practice and Procedure - Unfair Labour Practice - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local

president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld	
CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS	16
Evidence - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Parties requesting that Board decide, as preliminary matter, scope of relevant past practice evidence with respect to disputed work - Board ruling that evidence should be restricted to ICI sector and to precast concrete ducts (as opposed to all conduit duct banks)	
ADAM CLARK COMPANY LTD., I.B.E.W., LOCAL 350 AND; RE L.I.U.N.A., LOCAL 1089.....	6
Evidence - Discharge - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld	
CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS	16
Health and Safety - Discharge - Deputy fire chief of volunteer fire department alleging that he was removed from his position for acting in compliance with, and seeking enforcement of, <i>Occupational Health and Safety Act</i> - Board determining that town council not motivated by anti-safety animus - Complaint dismissed	
TOWNSHIP OF MATCHEDASH COUNCIL, THE; RE RONALD GERALD TISLER .	87
Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Parties - Practice and Procedure - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers' strict legal interest in proceedings, but exercising its discretion to grant Labourers standing	
ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS	47
Jurisdictional Dispute - Construction Industry - Evidence - Practice and Procedure - Parties requesting that Board decide, as preliminary matter, scope of relevant past practice evidence with respect to disputed work - Board ruling that evidence should be restricted to ICI sector and to precast concrete ducts (as opposed to all conduit duct banks)	
ADAM CLARK COMPANY LTD., I.B.E.W., LOCAL 350 AND; RE L.I.U.N.A., LOCAL 1089.....	6
Natural Justice - Bargaining Rights - Bargaining Unit - Certification - Construction Industry - Reconsideration - Employer submitting that Board's decision in <i>O.J. Pipelines</i> incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert	

employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed	
TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES	90
Parties - Certification - Practice and Procedure - Unfair Labour Practice - Carpenters' union applying for certification and filing unfair labour practice complaint - Labourers' union seeking to intervene on ground that remedy sought under complaint would have effect of displacing member of Labourers - Labourers also submitting that Board finding might affect outcome of grievance earlier filed by Labourers - Labourers' interest contingent on various factors - Board denying Labourers standing on adjudication of merits of complaint - Labourers, however, to be given notice of any subsequent hearing to deal with remedy and to have opportunity to show why they should be granted standing for that hearing	
AROSAN ENTERPRISES LIMITED; RE C.J.A., LOCAL 93.....	10
Parties - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers' strict legal interest in proceedings, but exercising its discretion to grant Labourers standing	
ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS	47
Practice and Procedure - Adjournment - Construction Industry - Related Employer - Board denying adjournment request made because respondents attempted to retain counsel virtually at last minute - Whether respondent companies engaged in related activities - But for "plumbing" work, activities of the two companies identical - Board holding that merely because a very small part of the work performed by the second respondent would be covered by the collective agreement with the first respondent not sufficient reason to deny union its remedy - Declaration issuing	
ACME PLUMBING & HEATING, VINCENT J. TRUDEAU & SONS INC. C.O.B. AS, AND 883553 ONTARIO INC. C.O.B. AS ACME BIVALENT SYSTEMS; RE U.A., LOCAL 463	1
Practice and Procedure - Certification - Charges - Inquiry into non-pay allegation disclosing loan by fellow employee and repayment - Board seeing no reason to direct hearing into allegation - Board to dispose of certification application without further notice unless it receives submissions from any party showing why the Board should hold a hearing into the allegation	
BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE U.P.G.W.A.	15
Practice and Procedure - Certification - Parties - Unfair Labour Practice - Carpenters' union applying for certification and filing unfair labour practice complaint - Labourers' union seeking to intervene on ground that remedy sought under complaint would have effect of displacing member of Labourers - Labourers also submitting that Board finding might affect outcome of grievance earlier filed by Labourers - Labourers' interest contingent on	

VIII

various factors - Board denying Labourers standing on adjudication of merits of complaint - Labourers, however, to be given notice of any subsequent hearing to deal with remedy and to have opportunity to show why they should be granted standing for that hearing

AROSAN ENTERPRISES LIMITED; RE C.J.A., LOCAL 93..... 10

Practice and Procedure - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers' strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 47

Practice and Procedure - Construction Industry - Evidence - Jurisdictional Dispute - Parties requesting that Board decide, as preliminary matter, scope of relevant past practice evidence with respect to disputed work - Board ruling that evidence should be restricted to ICI sector and to precast concrete ducts (as opposed to all conduit duct banks)

ADAM CLARK COMPANY LTD., I.B.E.W., LOCAL 350 AND; RE L.I.U.N.A., LOCAL 1089..... 6

Practice and Procedure - Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Unfair Labour Practice - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld

CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS 16

Reconsideration - Bargaining Rights - Bargaining Unit - Certification - Construction Industry - Natural Justice - Employer submitting that Board's decision in *O.J. Pipelines* incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed

TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES 90

Related Employer - Adjournment - Construction Industry - Practice and Procedure - Board denying adjournment request made because respondents attempted to retain counsel virtually at last minute - Whether respondent companies engaged in related activities - But for "plumbing" work, activities of the two companies identical - Board holding that merely because a very small part of the work performed by the second respondent would be covered by the

collective agreement with the first respondent not sufficient reason to deny union its remedy - Declaration issuing

ACME PLUMBING & HEATING, VINCENT J. TRUDEAU & SONS INC. C.O.B. AS, AND 883553 ONTARIO INC. C.O.B. AS ACME BIVALENT SYSTEMS; RE U.A., LOCAL 463

1

Representation Vote - Certification - Settlement - Unfair Labour Practice - Parties' settlement of certification application and related unfair labour practice complaint requiring Board to conduct representation vote - Board seeing no reason not to act on that agreement of the parties - Board directing representation vote

WEATHERSTRONG BUILDING PRODUCTS LTD.; RE U.S.W.A.; RE GROUP OF EMPLOYEES

100

Settlement - Certification - Representation Vote - Unfair Labour Practice - Parties' settlement of certification application and related unfair labour practice complaint requiring Board to conduct representation vote - Board seeing no reason not to act on that agreement of the parties - Board directing representation vote

WEATHERSTRONG BUILDING PRODUCTS LTD.; RE U.S.W.A.; RE GROUP OF EMPLOYEES

100

Settlement - Construction Industry - Construction Industry Grievance - Labour-Management Relations Committee hearing grievance at Step 3 of grievance procedure and issuing decision - Union submitting that matter in dispute thereby settled pursuant to grievance procedure set out in collective agreement - Board upholding union's preliminary motion, concluding that grievance settled, and directing employer to comply with terms of settlement

E.S. FOX LIMITED; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007

29

Termination - Timeliness - Board determining that under present wording of the Act and the Rules, an application for declaration terminating bargaining rights cannot validly be made or filed via facsimile transmission - Board ruling that application in this case made when six copies of completed Form 17 application delivered to Board by hand

MACMILLAN BATHURST INC.; RE REG BELL; RE C.P.U., LOCAL 1199

41

Timeliness - Termination - Board determining that under present wording of the Act and the Rules, an application for declaration terminating bargaining rights cannot validly be made or filed via facsimile transmission - Board ruling that application in this case made when six copies of completed Form 17 application delivered to Board by hand

MACMILLAN BATHURST INC.; RE REG BELL; RE C.P.U., LOCAL 1199

41

Unfair Labour Practice - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing

WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105

101

Unfair Labour Practice - Certification - Parties - Practice and Procedure - Carpenters' union applying for certification and filing unfair labour practice complaint - Labourers' union seeking to intervene on ground that remedy sought under complaint would have effect of displacing member of Labourers - Labourers also submitting that Board finding might affect outcome of grievance earlier filed by Labourers - Labourers' interest contingent on various factors - Board denying Labourers standing on adjudication of merits of complaint -

Labourers, however, to be given notice of any subsequent hearing to deal with remedy and to have opportunity to show why they should be granted standing for that hearing

AROSAN ENTERPRISES LIMITED; RE C.J.A., LOCAL 93..... 10

Unfair Labour Practice - Certification - Representation Vote - Settlement - Parties' settlement of certification application and related unfair labour practice complaint requiring Board to conduct representation vote - Board seeing no reason not to act on that agreement of the parties - Board directing representation vote

WEATHERSTRONG BUILDING PRODUCTS LTD.; RE U.S.W.A.; RE GROUP OF EMPLOYEES 100

Unfair Labour Practice - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Practice and Procedure - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers' strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 47

Unfair Labour Practice - Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld

CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS 16

3275-90-R; 3276-90-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, Applicant v. Vincent J. Trudeau & Sons Inc. c.o.b. as **Acme Plumbing & Heating** and 883553 Ontario Inc. c.o.b. as Acme Bivalent Systems, Respondents

Adjournment - Construction Industry - Practice and Procedure - Related Employer - Board denying adjournment request made because respondents attempted to retain counsel virtually at last minute - Whether respondent companies engaged in related activities - But for "plumbing" work, activities of the two companies identical - Board holding that merely because a very small part of the work performed by the second respondent would be covered by the collective agreement with the first respondent not sufficient reason to deny union its remedy - Declaration issuing

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *G. O. Shamanski* and *E. G. Theobald*.

APPEARANCES: *A. J. Ahee*, *B. Christie* and *M. Etchels* for the applicant; *Karen Trudeau*, *Joel Trudeau* and *Wade Trudeau* for the respondents.

DECISION OF THE BOARD; January 6, 1992

1. The names of the respondents are amended to read: "Vincent J. Trudeau & Sons Inc. c.o.b. as Acme Plumbing & Heating and 883553 Ontario Inc. c.o.b. as Acme Bivalent Systems".

2. The applicant (hereinafter referred to as "Local 463") has made applications to the Board under sections 1(4) and 63 of the *Labour Relations Act*. During final submissions, counsel for Local 463 advised the Board that his client wished to withdraw its application under section 63 of the Act. Having regard to this request and the time it was made, the application made under section 63 of the Act in Board File No. 3276-90-R is dismissed. In its section 1(4) application, Local 463 alleges that Vincent J. Trudeau & Sons Inc. c.o.b. as Acme Plumbing & Heating (hereinafter referred to as "Acme Plumbing") and 883553 Ontario Inc. c.o.b. as Acme Bivalent Systems (hereinafter referred to as "Acme Bivalent") constitute one employer for purposes of the *Labour Relations Act*.

3. At the commencement of the hearing, the respondents requested an adjournment. Although conceding that they had been given approximately one month's notice of the hearing, the respondents felt they would be able to settle the applications with the assistance of a Labour Relations Officer before the hearing. Two days before the hearing, it appeared to the respondents that the hearing would proceed and they contacted a lawyer. However, the lawyer they contacted was unable to attend the hearing on such short notice. The respondents requested an adjournment in order to have counsel present at a future hearing to assist them. Local 463 opposed the adjournment request.

4. After recessing to consider the parties' representations, the Board ruled orally at the hearing that the respondents' request for an adjournment of the hearing was denied. The respondents had adequate time to prepare the case and retain counsel who would be able to attend the hearing. Parties should not delay preparing for a hearing on the basis that the case might settle. In essence, the adjournment request was made simply because the respondents attempted to retain counsel virtually at the last minute. Having regard to these circumstances, the Board determined that it would have been inappropriate to grant the adjournment request.

5. Acme Plumbing was incorporated in 1975 and, in essence, can be described as a family

business. Vincent Trudeau and his wife Elva were the primary owners, with their sons Wade and Joel also holding some shares during certain periods of time. Vincent Trudeau died in 1987 and by 1990 Elva Trudeau held 100% of the shares of Acme Plumbing. In 1985, Joel Trudeau ceased being a shareholder and employee with Acme Plumbing. By 1990, Wade no longer had an ownership interest in Acme Plumbing, but he did continue to work as an employee.

6. The operations of Acme Plumbing consisted of three relatively distinct divisions. One of them was the plumbing division. Vincent Trudeau was in charge of this division until his death in 1987 and since then an employee named R. Belch ran the plumbing division. As a result of a labour dispute and other reasons, the plumbing division ceased operating in May 1990. By letter dated May 29, 1990, Acme Plumbing advised its customers that it was no longer able to offer services in the plumbing installations and services division of the company.

7. Wade Trudeau was responsible for the refrigeration and service division of Acme Plumbing. The remaining division involved sheet metal work, the design of HVAC systems and project management work. As noted earlier, Joel Trudeau ceased to be an employee of Acme Plumbing in 1985. At that time he and his wife, Karen Trudeau, formed a management company called MDM Associates ("MDM"). MDM performed the work of the third division on a subcontract basis for Acme Plumbing. In 1988, Karen Trudeau started working for MDM. Until August 1990, MDM also handled the financial and management aspects of Acme Plumbing's business.

8. When the plumbing division folded in May 1990, Wade and Joel intended to continue operating the sheet metal, heating and air conditioning installations and service divisions. In July 1990, the bank called in its demand loans which exceeded \$100,000.00. Acme Plumbing had been losing money since 1987. Once the loans were called, a decision was made to wind down the business as soon as possible. By August 1990, the business was dormant and all the employees had been laid off. Attempts are being made to collect accounts receivable in order to pay off remaining debts.

9. Local 463 and Acme Plumbing are bound to two collective agreements. One is the Plumbers' Provincial Agreement and the other is a low-rise residential construction agreement. The bulk of the work covered by these collective agreements was performed by Acme Plumbing's plumbing division. In its other divisions, Acme Plumbing specialized in the installation, design and service of the Kool-Fire line of bivalent heat pumps and air conditioners. The gas piping associated with these systems was performed by Local 463 under the terms of the collective agreements referred to above.

10. Since Joel and Wade Trudeau were unable to continue the business under Acme Plumbing, they incorporated Acme Bivalent in July 1990. With Acme Bivalent, Wade and Joel Trudeau carry on those aspects of the former business with which they are familiar. Acme Bivalent is engaged in heating, air conditioning and sheet metal work. It does not engage in plumbing work since it does not possess a valid City of Belleville Master Plumber's Licence. Those persons who were engaged as plumbers by Acme Plumbing are not employed by Acme Bivalent. In fact, two of those persons now work for other companies and took with them most of Acme Plumbing's accounts. It appears that most of the employees who worked in the other divisions of Acme Plumbing have been hired and worked at least briefly for Acme Bivalent. Acme Bivalent works out of the same location previously occupied by Acme Plumbing. This property is owned by Elva Trudeau who rented space to Acme Plumbing and now rents space to Acme Bivalent. Karen Trudeau began working as an employee for Acme Bivalent in August 1990. She manages the financial affairs of the business.

11. Prior to the hearing, Acme Bivalent installed fourteen residential Kool-Fire units.

Twelve of these units utilized propane and the suppliers hooked up the units. The two natural gas units were hooked up by a licensed gas fitter. From the evidence, it appears that only approximately 2% of the work now performed by Acme Bivalent would have been performed by members of Local 463 under the terms of its low-rise residential construction agreement with Acme Plumbing.

12. Section 1(4) of the Act provides as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

13. The following paragraphs in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 set out the purpose and effect of section 1(4) of the *Labour Relations Act*.

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [63] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section [63] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section [63]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of businesses between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section [63] into

play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

• • •

15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in "associated or related activities or businesses" since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be "related" within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company, and cannot be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the "associated or related activities or businesses" need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business or endeavour or even contemporaneously economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

14. The respondents stated their position very clearly and concisely in argument. In their view, the collective agreements which Local 463 had with Acme Plumbing concerned the plumbing aspect of its business. That aspect of Acme Plumbing's business was discontinued and is not being performed by Acme Bivalent. The respondents assert simply that the bargaining rights of Local 463 which attach to the business of Acme Plumbing did not relate to the business now carried on by Acme Bivalent. Although they did not use these words, the respondents in essence took the position that Acme Plumbing and Acme Bivalent were not engaged in related activities.

15. As the wording of subsection 1(4) discloses three conditions must be satisfied in order for the Board to exercise its discretion to treat more than one entity as one employer for purposes of the Act. They are:

- (1) there must be more than one corporation, individual, firm, syndicate or association or any combination thereof;
- (2) the activities or businesses of two or more of those entities must be under common control or direction; and,
- (3) the entities concerned must carry on related or associated activities or businesses.

In considering the evidence before us, the Board is satisfied that the three pre-conditions have been met in this case.

16. There are two corporations, namely Acme Plumbing and Acme Bivalent. The busines-

ses of both respondents are under common control or direction. In the latter years of its operation, MDM handled the financial and management aspects of Acme Plumbing's business. It appears, as well, that Wade Trudeau exercised a certain degree of control and direction with respect to the refrigeration and service aspects of Acme Plumbing's business. The persons who control and direct Acme Bivalent are Wade Trudeau and Joel Trudeau, one of the principals of MDM.

17. The respondents are correct when they assert that Acme Bivalent does not carry on the "plumbing" business which Acme Plumbing once did. However, the Board has interpreted the words "associated or related activities or businesses" in a manner consistent with the broad remedial purpose of subsection 1(4). In this context, it is useful to note the following comments in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature ("associated" or "related", "activities" or "businesses"), it is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine, Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC ¶14,270), and it is one with which we respectfully agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are "unrelated" - particularly if they are being undertaken at the same time and involve common managerial or employee skills...

18. Acme Plumbing and Acme Bivalent are engaged in related activities. But for the "plumbing" work, the activities of the two companies are identical. The primary activity of Acme Bivalent is the installation, design and service of the Kool-Fire line of bivalent heat pump and air conditioners. Acme Plumbing was also involved in these activities. Although the percentage is very small, a mere 2%, the Board notes that Acme Bivalent does carry on activities which had been performed by Acme Plumbing by members of Local 463 under the terms of its collective agreements with Acme Plumbing. Our determination that Acme Plumbing and Acme Bivalent carry on related activities within the meaning of section 1(4) of the Act is supported by the Board's decision in *Warren Steeplejacks Limited*, [1989] OLRB Rep. March 309.

19. The Board is also satisfied that this is an appropriate case in which to exercise its discretion to grant Local 463 the remedy it seeks. The respondents did not provide us with any labour relations rationale for not exercising our discretion in this way. Merely because a very small portion of the work performed by Acme Bivalent would be covered by the collective agreements Local 463 has with Acme Plumbing is not sufficient reason to deny Local 463 a single employer declaration. Accordingly, the Board declares that Vincent J. Trudeau & Sons Inc. c.o.b. as Acme Plumbing & Heating and 883553 Ontario Inc. c.o.b. as Acme Bivalent Systems constitute one employer for purposes of the Act and that both respondents are bound to the Plumbers' Provincial Agreement and the low-rise residential construction agreement.

2505-90-JD Labourers' International Union of North America, Local 1089, Complainant v. International Brotherhood of Electrical Workers, Local 530 and Adam Clark Company Ltd., Respondents

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Parties requesting that Board decide, as preliminary matter, scope of relevant past practice evidence with respect to disputed work - Board ruling that evidence should be restricted to ICI sector and to precast concrete ducts (as opposed to all conduit duct banks)

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members D. A. MacDonald and C. A. Ballentine.

APPEARANCES: James Hayes and Bob Leone for the complainant; Laurence C. Arnold, Frazer Collins and Ralph Tersigni for the respondent trade union; R. Andrew Staniusz and Lionel Coleman for the respondent employer.

DECISION OF THE BOARD; January 2, 1992

1. This is a jurisdictional dispute complaint filed pursuant to section 91 of the *Labour Relations Act*.
2. The parties' positions are summarized in the pre-hearing conference memorandum dated June 17, 1991. The parties agreed on the description of the work in dispute but were unable to agree on the scope of the relevant past practice evidence respecting the work in dispute.
3. The respondent, International Brotherhood of Electrical Workers, Local 530, (IBEW) takes the position that the industry (or area) past practice should be limited to the ICI sector in Board Area No. 2 for all types of duct systems.
4. The complainant, Labourers' International Union of North America, Local 1089 (Labourers) and the respondent employer submit that industry practice should be limited to Board Area No. 2 respecting the installation of precast concrete duct systems for electrical cables, of which the Trenwa Duct System is one type, but not restricted to the ICI sector.
5. The parties requested that the Board hear and decide as a preliminary matter the scope of the relevant past practice evidence with respect to the disputed work. The parties agreed that they would be bound by the decision and would abide by it whether or not this panel heard the complaint on the merits. The parties further agreed that this panel or another panel may hear the complaint as set out in the pre-hearing conference memorandum.
6. The respondent IBEW submits there are two issues for the Board to determine. One is whether the evidence should be restricted to the ICI sector. The second issue is whether evidence with respect to similar conduit duct banks is admissible evidence subject to the discretion of the panel hearing the matter to determine its weight or relevance.
7. Counsel for IBEW cited a number of cases in support of its position to limit the evidence to the ICI sector. *Commonwealth Construction Company*, [1991] OLRB Rep. June 742 states:

...

23. A review of the cases indicates that "industry" practice generally refers to the construction

industry. However, the *Act* itself and the trade unions and employers engaged in the construction industry have recognized that the construction industry has a number of different “divisions” or “sectors” as determined by “work characteristics”. (See section 117(e) of the *Act*). Within the construction industry there may be a different “industry practice” within these various sectors. A review of the jurisdictional dispute decisions rendered by the Board indicate that it has been generally accepted (or at least not addressed in the decisions or disputed by the parties) that in the adjudication of jurisdictional dispute complaints the Board should limit the industry practice evidence to that sector or division of the construction industry in which the dispute arose. In so doing the Board and the parties implicitly acknowledge that the history of organizing in the construction industry and the work jurisdiction claimed by the trades may vary from sector to sector.

...

28. There is no dispute that in this complaint the work in dispute falls within the ICI sector of the construction industry. Accordingly, we have determined that the industry practice evidence should be limited to that sector.

...

8. Other cases cited include *K-Line Maintenance and Construction Ltd.*, [1979] OLRB Rep. Dec. 1185, *Urban Consolidated Construction Corporation Ltd.*, [1977] OLRB Rep. Feb. 41, *Armbro Materials and Construction Ltd.*, [1986] OLRB Rep. May 579 and *Dufferin Construction Co.*, [1988] OLRB Rep. Nov. 1164 which states in part:

... “In the Board’s view, resolution of the sector dispute is likely to impact on the relevance of the criteria of employer preference and employer past practice as well.” ...

9. The second part of the preliminary issue deals with the extent of evidence to be heard with respect to “duct bank systems”. Counsel submits the IBEW should be given the opportunity to show, whether or not it succeeds, that the work in dispute, namely installation of duct bank systems which includes the Trenwa System, can be performed on the ground, above the ground or below the ground. The work is the installation of material for conduit duct banks, be they cable pans or trays, whether the material used is precast concrete, fibreglass, steel or other material, or some space age material such as graphite or ceramics. The respondent IBEW wants to be able to argue before the Board hearing the merits the weight that the Board should give to similar installations provided the Board admits evidence of installations of all types of duct banks and not restrict it to precast concrete duct banks.

10. Counsel for the IBEW submits the Board should either rule in favour of admitting evidence of all types of conduit duct bank installations or leave this issue for the next hearing panel. Cases cited in support of hearing evidence respecting different types of duct bank installations include *Newmarch Inc.*, [1990] OLRB Rep. Feb. 179; *Foster Wheeler Limited*, [1989] OLRB Rep. Feb. 128.

11. Counsel for the complainant Labourers submits the Board should make its decision on the preliminary matter as set out in the pre-hearing conference memorandum. Counsel takes the position this is a precast concrete house or box in which cable is laid. There is no dispute over the end use nor is the end use relevant. The question is whether concrete forms (or housing) of this kind is properly within the jurisdiction of the electricians or the labourers.

12. *Foster Wheeler Limited*, *supra* takes a look at this issue (“particular work” as stated in section 91(1)) and defines the work in dispute relatively narrowly. In that case there were three areas in which the Board restricted the work:

• • •

13. At the conclusion of the hearing of the submissions of the parties in respect of this matter the Board rendered the following oral ruling:

Section 91 of the *Labour Relations Act* authorizes this Board to inquire into a jurisdictional dispute involving “particular work”. After having considered the submissions of the parties and in view of the language used in section 91 we make the following ruling in respect of the parameters of the evidence which the Board deems relevant in respect of this complaint.

The evidence to be adduced will be limited to the evidence within the following parameters:

Only evidence relating to field erected, steam generating boilers, for industrial application, originally erected using Boilermakers, which were or are being dismantled or disassembled in an operating environment in the province of Ontario.

In our view, the reference to “particular work” in section 91 compels the Board when examining “employer” and “area” Practice to inquire into work involving the same or similar type of structure, in the same or similar type of environment.

• • •

13. Counsel also cited *Acco Canadian Material Handling*, [1990] OLRB Rep. Sept. 915 which limited the evidence with respect to a specific system called “monoveyor”.

14. Counsel for the complainant Labourers submits what is at issue here is quite simple, namely “putting concrete forms into the ground, on or below ground, and the labourers are claiming the work”. Counsel agrees to the geographic scope of the evidence being Board Area No. 2. Counsel submits the Board has a standard practice with respect to Board area practice and with respect to sectors. The question is whether or not in a particular case the Board should deviate somewhat from its practice. The electricians wish to define the disputed work as broadly as possible so that anything described as duct banks becomes arguably relevant. If the work is restricted to ICI then the same work done on *Ontario Hydro* sites would become irrelevant. It is not reasonable to enquire into all types of duct banks but rule out evidence of the same work because it is in another sector. Counsel submits there is a balance to be struck.

15. In both *Foster Wheeler Limited*, *supra*, and *Commonwealth Construction Company*, *supra*, the Board went beyond Board Areas to get evidence before it and counsel for the Labourers asks on the same theory that the Board consider extending the evidence to the power sector or any other sector but do not open it up to days of evidence of work not in dispute. Counsel submits the issue should be narrow.

16. The respondent employer agrees with and adopts the Labourers submissions. In addition counsel submits this panel should rule on the issues put before it and not defer to the merits panel.

17. Counsel for the employer referred to paragraph two of *Acco Canadian Material Handling*, *supra*, as being analogous to the situation before us. Labourers say it is the installation of precast concrete duct system of which Trenwa is one type. The electricians want to include all duct banks. The particular work in *Acco Canadian Material Handling*, *supra*, is the monorail not all other conveyor systems. Counsel also referred to *Newmarch Inc.*, *supra*, for the proposition that the end use is not relevant:

• • •

63. In the past, the Board has not looked at the use made of the end product in determining jurisdictional dispute claims. Rather, the focus of the Board has been on the nature of the work in dispute, and the work performed by the employees in each trade. Thus, in *Toronto Star Newspapers Ltd.*, [1980] OLRB Rep. April 565, after referring to the decisions of the Québec Labour Court sitting in appeal from a decision of a labour commissioner in *La Presse Limitée*, and the Labour Relations Board of British Columbia in *Re. Pacific Press*, the Board stated at paragraph 19:

19. We accept the conclusion reached in both *Pacific Press*, *supra* and *La Presse*, *supra*, that the Board must look to the nature of the work done by the employees and not the use made by the employer of the end product of the work in dispute. If the end product was to be cast as a primary criterion the result would be to downgrade the importance of skills and ability, and efficiency, as primary criteria. Clearly the skills associated with performing a work process and the efficiency with which it is performed are inter-related factors. A craft union is one whose members "are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or craft." When called upon to resolve competing work claims between craft unions the Board must look to the work and determine if the skills of one of the crafts are more closely related to the nature of the work in dispute and whether or not the use of these skills by persons trained in the craft will have a bearing on efficiency and economy. If we were to restrict ourselves to the end product these considerations, which must be central to the resolution of any jurisdictional dispute, would become irrelevant.

(See also *Premier Pipe Line*, [1988] OLRB Rep. Oct. 1068 at paragraph 26). We agree with and adopt these earlier observations of the Board. "End use" is not an appropriate criteria to assist in the determination of this jurisdictional dispute. Moreover, in this case, the evidence does not support the claim of the UA to either the Hollywood Rail or the support steel on the basis of "end use". Indeed, the evidence is to the contrary and highlights the difficulty in applying the "end use" criteria in jurisdictional dispute complaints.

18. The employer agrees with the Labourers that evidence beyond the ICI sector should be admitted. If end use is irrelevant then the same consideration should be applied to the sector. The Board looks to end use to determine what sector the work falls in. If there is no evidence of different practice in sectors it makes no sense to limit it. The characteristic of the work does not change from one sector to another.

19. In reply counsel for the IBEW stated they want to be able to show that this is work which traditionally is performed by the IBEW. The IBEW is only concerned with "houses" containing electrical cable regardless of the material used. Counsel submits sheet metal pans housing electrical cable for example are not installed by sheet metal workers but by electricians.

20. Counsel for the IBEW argues *Acco Canadian Material Handling*, *supra*, represents a middle ground between the extremes of *Foster Wheeler*, *supra*, on the one hand and *Newmarch Inc.*, *supra*, on the other. Paragraph 5 of *Acco Canadian Material Handling*, *supra*, states in part:

"... That raises the question of where is the sensible place to draw the line as to the past practice evidence to be heard. In the instant proceeding, in the Board's view, limiting past practice evidence to the two types of conveyor systems was that place. This is because the two systems include a sufficient variety of conveyors which might arguably be included in the term "monorail conveyor" so as to allow the parties full opportunity to present their evidence and make their submissions respecting the conclusions to be drawn by the Board from past practice evidence".

The IBEW is asking to have an opportunity to call evidence on installations of conduit duct bank systems as opposed to restricting the evidence to precast concrete duct systems.

Decision

21. The parties agreed to the past practice being limited to Board Area No. 2.

22. Having considered the submissions of the parties and the cases cited we are not persuaded to hear evidence of past practice outside the ICI sector. The dispute arose in the ICI sector. Looking to other sectors to determining who has jurisdiction in the ICI sector, in our view will expand the number of hearing days without significant benefit to the determination of the issue before the Board.

23. The remaining issue deals with how much evidence should be allowed in terms of the "particular work". The IBEW wants the Board to hear evidence of "all conduit duct banks". The complainant and the employer want the evidence restricted to precast concrete duct banks or system of which Trenwa is one type. The particular work in dispute replaced a metal duct bank which was above ground and installed by the electricians. The IBEW's view is that the disputed work involves electrical conduit duct banks which happen to be made of precast concrete. The Labourers and the company's view is that this work involves precast concrete housing or structures which happen to be carrying electrical cable.

24. The Labourers are only claiming duct banks made of precast concrete. There is no claim with respect to duct banks made of any other type of material. Evidence of installations of other types of duct banks consisting of materials other than precast concrete will not be of assistance to the Board to determine this particular jurisdictional dispute. The fact that electricians install sheet metal pans for electrical cable for example cannot be of assistance in determining whether the installations of precast concrete ducts is work performed by one trade or another.

25. Having regard to the above the scope of the past practice is restricted to precast concrete ducts in the ICI sector in Board Area No. 2. To expand the scope of past practice would add a significant number of days to the hearings without significant benefit.

2446-91-R; 2567-91-U United Brotherhood of Carpenters and Joiners of America, Local 93, Applicant v. **Arosan Enterprises Limited**, Respondent; United Brotherhood of Carpenters and Joiners of America, Local 93, Complainant v. **Arosan Enterprises Limited**, Respondent

Certification - Parties - Practice and Procedure - Unfair Labour Practice - Carpenters' union applying for certification and filing unfair labour practice complaint - Labourers' union seeking to intervene on ground that remedy sought under complaint would have effect of displacing member of Labourers - Labourers also submitting that Board finding might affect outcome of grievance earlier filed by Labourers - Labourers' interest contingent on various factors - Board denying Labourers standing on adjudication of merits of complaint - Labourers, however, to be given notice of any subsequent hearing to deal with remedy and to have opportunity to show why they should be granted standing for that hearing

BEFORE: *S. Liang*, Vice-Chair, and Board Members *D. A. MacDonald* and *P. V. Grasso*.

APPEARANCES: *Steven Waller*, *Richard Ellis*, *Claude Guindon* and *Andy Root* for the applicant;

C. E. Humphrey and *Santokh Singh* for the respondent; *Daniel Randazzo* for Labourers' International Union of North America, Local 527.

DECISION OF THE BOARD; January 10, 1992

1. The name of the respondent is amended to read: "Arosan Enterprises Limited".
2. These matters are an application for certification and a complaint of unfair labour practices. These files are consolidated for hearing. For ease of reference, in addition to "the applicant" and "the respondent", the parties will hereinafter be referred to as "the Carpenters", "Arosan" and "the Labourers". On the first day of hearing, the parties spent some time in an attempt to narrow or settle some of the issues. This attempt being unsuccessful, the Board commenced the hearing just after noon.
3. After hearing the submissions of the parties with respect to the certification application, we decided that it would be appropriate to appoint a Labour Relations Officer to meet with the parties with respect to the list and composition of the bargaining unit. Our ruling on that issue is contained in another written decision of this panel dated January 10, 1992.
4. We also decided to devote the rest of the day to hearing submissions by the parties with respect to the request by the Labourers' International Union of North America, Local 527 to intervene in the proceedings, and reserved our ruling on this matter.
5. In the application for certification, there is a dispute between the parties as to whether there were any employees in the bargaining unit on the date of application. The applicant understands that there were three persons employed by Arosan as carpenters or carpenters' apprentices on October 23, 1991. The respondent states that these persons were not employed as carpenters or carpenters' apprentices. In materials filed in response to the complaint under section 91 [formerly section 89], counsel for Arosan states that these persons "may" have been employed as labourers. In fact, the Labourers have filed a grievance against Arosan with respect to the employment of the three persons in dispute, alleging that the respondent has failed to employ members of the Labourers in accordance with the collective agreement between Arosan and the Labourers.
6. In the complaint under section 91, the Carpenters allege that shortly after Arosan became aware of the certification application, it terminated the employment of all carpenters and carpenters' apprentices who were the subject of the application. These persons are named as Pierre Beauchamp, Chris Hynes and Craig Caughey. The Carpenters allege that the terminations of employment were motivated solely by a desire to get rid of any employee who might have supported the certification application, and were in violation of sections 65, 67 and 71 [formerly 64, 66, and 70] of the Act. As remedy, the Carpenters request an order that the employer reinstate the grievors, an order for compensation to the grievors, a declaration that the employer has breached the applicable provisions of the Act, an order that the employer post a notice at the workplace admitting its violations of the Act, and automatic certification under the provisions of section 8 of the Act.
7. Prior to the hearing, the Board received a letter from counsel for Arosan asking that the Labourers be given notice of the pending hearing into the unfair labour practice complaint. Counsel stated that the same group of employees are the subject of both the grievance by the Labourers, and the complaint under section 91 by the Carpenters, and that the issue of whether these individuals are labourers or carpenters is of interest to Local 527.

8. Subsequently the Board also received formal notice from the Labourers of its intention to intervene in this complaint.

9. At the hearing, counsel for the Labourers clarified that they do not seek to intervene in the certification application, but only seek status in the complaint. He submitted that there are two bases on which the Board should grant status. First, with respect to the remedy sought under the complaint, the reinstatement of the grievors would have effect of displacing members of the Labourers. Counsel relies on *Amoco Fabrics Ltd.*, [1982] OLRB Rep. Mar. 314.

10. The second basis for the Labourers' request for standing relates to the grievance filed under the Labourers' collective agreement. The Labourers assert that if during the course of adjudicating the complaint under section 91, the Board finds that the grievors were not employed as labourers, this finding will affect the outcome of the grievance.

11. Counsel for Arosan concurred in the request by the Labourers. The concern of Arosan is that it may be faced with liability under two different proceedings for the same work. If there is a determination as to whether the employees were employed by Arosan as labourers or as carpenters, the Labourers ought to be party to that determination. Further, counsel agreed that the remedy requested by the Carpenters in the unfair labour practice complaint is complicated by the respondent's obligations under its collective agreement with the Labourers.

12. Counsel for the Carpenters opposes the request for standing. He submits that there is an open question as to the position to which the grievors would be reinstated in any event. Further, with respect to the grievance, he states that the issues under the grievance are distinguishable from the issues under the unfair labour practice complaint. The complaint will focus on the work performed by the grievors on the application date, October 23. The grievance covers a broader period. The outcome of the complaint as it determines the status of the grievors will thus not affect the merits of the grievance.

Decision of the Board

13. It is not clear to us that the determination of the unfair labour practice complaint would require the Board to make a finding as to whether these employees were engaged in work which was covered by the Labourers' collective agreement. The allegation is that the employment of the grievors was terminated because of a desire to thwart the certification application or to punish those who may have been involved in the organizing drive. The respondent states that the grievors were laid off because of shortage of work. It states that their employment was terminated either because the work had been completed, or sub-contractors under pre-existing contracts with the respondent assumed responsibility for the work.

14. In this context, it does not appear to us that the success or lack of success of the complaint will depend on any finding that the work performed by the grievors was work falling with the collective agreement between the respondent and the Labourers. On the pleadings, this issue simply does not appear to be relevant to the merits of the complaint.

15. Even if the Board were required, during the course of adjudicating the complaint, to determine whether the employees were engaged as carpenters or carpenters' apprentices during the period covered by the complaint, we do not see this determination as affecting the outcome of the grievance by the Labourers. It has been observed by this Board that, especially in the construction industry, more than one trade union may have bargaining rights for different sets of employees who, though described in terms of different job categories, perform some of the same work. See for instance *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305.

Overlaps in work jurisdiction as contained in different collective agreements are what give rise to jurisdiction disputes. It is possible that the work in question in these proceedings is work which can be performed by labourers under labourers' collective agreements, or carpenters under carpenters' collective agreements. A finding by this Board that these employees were engaged as carpenters or carpenters' apprentices during the relevant period does not preclude a finding in another forum that this same work is covered by the Labourers' collective agreement.

16. On the other hand, the circumstances of this case bear some similarity to those in *Amoco Fabrics Ltd.*, to the extent that there is a possibility that the remedy requested by the Carpenters may impinge on the terms of the Labourers' collective agreement. For this reason, the Labourers' may be an affected party. There is also a possibility, however, that the Labourers' interests will not be affected. There may be a finding against the Carpenters on the merits of the complaint. Further, even if there is a finding against Arosan and reinstatement is contemplated, it may turn out that there is employment available to the grievors which does not affect the Labourers.

17. Because the interests of the Labourers is at this point contingent on the above factors, we do not find it desirable to grant them standing on the adjudication of the merits of the complaint. However, they will be served with our decision on this issue. The Labourers will be given notice of any subsequent hearing to deal with remedy and will have the opportunity to show why they should be granted standing for that hearing.

18. In addition to January 17, a date previously scheduled, this hearing will proceed on March 11 and 27, dates which have been set in consultation with the parties. Both matters will continue to be listed for hearing together, although the determination of the list and composition of the bargaining unit will await the conclusion of the inquiry by the Labour Relations Officer.

2364-91-R Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 172 Restoration Steeplejacks, Applicant v. **Belair Restoration (Ontario) Inc.**, Belair Restoration (Ottawa), Respondents

Certification - Construction Industry - Board dismissing union's certification application in accordance with Practice Note #7, but declining employer's request to impose 6 month bar on future applications for certification

BEFORE: *S. Liang*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

DECISION OF THE BOARD; January 6, 1992

1. This is an application for certification. By endorsement dated November 14, 1991, the Board appointed a Labour Relations Officer to inquire into and report to the Board on the list and composition of the bargaining unit. The parties met pursuant to that order with a Labour Relations Officer on November 27th, and December 3rd, 1991. Following the discussions, the applicant wrote to the Board on December 10th requesting leave of the Board to withdraw its application. The respondent, in turn, requests that the Board dismiss the application and impose a six months bar, stating in a letter of December 11th:

... I would point out to the Board that the Applicant had previously filed an Application for Certification under Board File No. 1234-91-R on July 9, 1991. In that matter the Union withdrew its Application, and the Board dismissed the Application. Given the proximity in time of the Board's Order to this current Application which the Applicant seeks to withdraw, the Respondent is requesting that the Board dismiss the instant Application and impose a six-month bar.

2. As noted in the letter, the applicant had previously filed an application (Board File No. 1234-91-R) for the same bargaining unit of employees employed by the respondent. In the previous application, the applicant also sought leave of the Board to withdraw its application. The request was made after the parties had met with a Labour Relations Officer and reviewed the list of employees and prior to the announcement by the Labour Relations Officer of the applicant's membership status ("the count"). The respondent took the position that the application should be dismissed by the Board. Having regard to the terms of settlement filed by the parties, the Board dismissed the application for certification.

3. When the Board receives a request from an applicant for leave to withdraw an application for certification, the Board may, instead of granting leave, dismiss the application. Practice Note #7 of the Board's Practice Notes sets out the circumstances in which a dismissal will issue. Having regard to that Practice Note, the Board hereby dismisses the current application.

4. Somewhat different considerations are applied when the Board determines whether or not, in addition to dismissal, to impose a bar to further applications. The rationale for imposing a bar was reviewed by the Board in *Amarcord Carpenters Ltd.*, [1989] OLRB Rep. June 531. Under section 103(2)(i) of the *Labour Relations Act*, the Board has the power:

103.-(2) ...

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

5. In *Amarcord Carpenters Ltd.*, the Board identified two general circumstances in which a bar may be imposed. First, a bar may be imposed where a request for withdrawal is made at a stage of the proceedings where the applicant must be anticipating defeat at a request of a representation vote. The bar is imposed in order to provide employees who have been given their opportunity to express their wishes through a representation vote, with a cooling-off period.

6. The Board has also stated that it may impose a bar in "special and extreme circumstances": *J. W. Crooks Company*, [1972] OLRB Rep. Feb. 126. In *J. W. Crooks Company*, the special and extreme circumstances involved four unsuccessful applications made by the same applicant in a little over three months.

7. In our view, the facts of this application do not fall within either of the circumstances identified in *Amarcord Carpenters Ltd.* The imposition of a bar in the current application would be merely punitive and serve no labour relations purpose. We therefore decline the respondent's request to impose a bar on future applications for certification by this applicant.

2612-91-R International Union, United Plant Guard Workers of America, Applicant v. Burns International Security Services Limited, Respondent

Certification - Charges - Practice and Procedure - Inquiry into non-pay allegation disclosing loan by fellow employee and repayment - Board seeing no reason to direct hearing into allegation - Board to dispose of certification application without further notice unless it receives submissions from any party showing why the Board should hold a hearing into the allegation

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

DECISION OF THE BOARD; January 15, 1992

1. In this application for certification, the Board ordered a Labour Relations Officer to conduct an inquiry into an allegation that one of the persons for whom the applicant has submitted membership evidence did not in fact pay a \$1.00 fee. The person in question was named by the respondent at the hearing. This inquiry has now taken place. The information disclosed by this inquiry is that the person in question did not pay \$1.00 at the time that he signed the application for membership in the union and receipt of payment. However, later in the same day, a fellow employee paid the collector of the card \$1.00 on behalf of the signer. Approximately two weeks later, the signer repaid the fellow employee \$1.00. All of these events occurred prior to the completion of the Form 9 Declaration Concerning Membership Documents.

2. The Board is satisfied that the above events, taken in totality, indicate that the person in question has applied for membership in the applicant and has paid to the applicant an amount of at least \$1.00 in respect of initiation fees, within the meaning of section 1(1) of the Act. Based on this information and the Board's jurisprudence on the matter, particularly the reasons in *Calvano Lumber & Trim Co. Ltd.*, [1988] OLRB Rep. Aug. 735, we see no reason to direct a hearing into the non-pay allegation.

3. As indicated in our prior decision of December 23, 1991, there are no issues in dispute between the parties with respect to this application. If we do not receive any submissions from any party showing why the Board should nevertheless hold a hearing into the allegations, within 10 days of receipt of this decision, we will dispose of this application for certification without further notice to or submissions from the parties.

2777-91-U Tanya Craig, Complainant v. Aluminum, Brick and Glass Workers International Union, Local 203, and Consumers Glass, Respondents

Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Unfair Labour Practice - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld

BEFORE: *Robert D. Howe*, Vice-Chair.

APPEARANCES: *Tanya Craig* and *Richard Lee* for the complainant; *Rodney Bezo* and *Marco Monaco* for the respondent trade union; *John LaScala* for the respondent company.

DECISION OF THE BOARD; January 28, 1992

1. The names of the respondents are amended to read: "Aluminum, Brick and Glass Workers International Union, Local 203" and "Consumers Glass".
2. This is a complaint under section 91 (formerly section 89) of the *Labour Relations Act* in which the complainant, Tanya Craig, alleges that she has been dealt with by the respondent, Aluminum, Brick and Glass Workers International Union, Local 203 (also referred to in this decision as the "Union" and "Local 203", for ease of exposition) contrary to section 69 (formerly section 68) of the Act.
3. This complaint was filed with the Board on November 25, 1991, and was heard on January 13, 1992, after a Labour Relations Officer's endeavours to effect a settlement (pursuant to section 91(2) of the Act) were unsuccessful. During the course of the hearing, the complainant sought to adduce evidence concerning certain aspects of those settlement endeavours. However, the Board declined to hear it because of the privilege which applies to such evidence (see Sopinka and Lederman, *The Law of Evidence in Civil Cases* at pages 196-204, and section 113(6) of the Act).
4. During the hearing of this complaint, the Board heard testimony from the complainant and from Richard Lee (who assisted the complainant in the presentation of her case), as well as from Marco Monaco, the President of Local 203, and John LaScala, Human Resources Manager for the respondent, Consumers Glass (also referred to in this decision as the "Company"). In addition to that oral evidence, the Board has before it eleven exhibits which were entered into evidence during the course of the hearing. In making the findings and reaching the conclusions set forth in this decision, the Board has carefully considered all of that oral and documentary evidence, the usual factors relevant to assessing credibility, and the submissions of the parties. The Board has also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.
5. The collective agreement in force between the Union and the Company from March 29, 1990 to March 28, 1993, includes the following provisions:

Article 2 - RECOGNITION

2.01

- (a) The Company recognizes the Union as the collective bargaining agent for its employ-

ees at its Hamilton plant and Saltfleet Warehouse, and Mould Design and Manufacture at 215 Hempstead Drive, save and except assistant supervisor, persons above the rank of assistant supervisor, guards, office and clerical staff and sales staff.

• • • •

Article 4 - RESERVATION OF MANAGEMENT RIGHTS

4.01 The Union acknowledges that it is the exclusive function of the Company to:

- (a) Maintain order, discipline and efficiency;
- (b) hire, discharge for just cause, classify, direct, transfer, promote, demote, lay-off and suspend or otherwise discipline employees, subject to the right of employees to lodge a grievance as herein provided by this Agreement;

• • • •

Article 5 - GRIEVANCE PROCEDURE

• • • •

5.14 DISCHARGE GRIEVANCE

A claim by an employee who has completed the probationary period that he/she has been unjustly discharged or suspended for three (3) days or more shall be treated as a grievance if a written statement of such grievance is lodged at Step No. 2 within five (5) full working days after the employee ceases to work for the Company....

Article 7 - SENIORITY

7.01

(a) PROBATION PERIOD

An employee will be considered on probation and will not be subject to the seniority provisions of the Agreement, nor shall the employee's name be placed on the appropriate seniority list until the completion of either thirty (30) working days of consecutive employment or forty-five (45) working days of intermittent employment within any twelve (12) consecutive calendar months.

Upon completion of such probation period, the employee's name shall be placed on the respective seniority list with seniority entitlement based upon length of continuous service dating as of thirty (30) consecutive working days or forty-five (45) working days of intermittent employment immediately prior thereto.

• • • •

7.02 DISMISSAL OF PROBATIONARY EMPLOYEE

It is understood that probationary employees may be dismissed by the Company for reasons less serious than might justify the dismissal of an employee who has acquired seniority and, accordingly, the dismissal of a probationary employee will not be the subject of a grievance.

6. Also relevant to the instant case is the following letter of understanding which is one of fourteen such letters included in the collective agreement booklet between the signature page and the appendices which set forth wage rates and classifications:

Mr. R. Bezo,
Executive Officer District 6,
Aluminum Brick and Glass Workers,
230 Lakeshore Road East, Suite 220,
MISSISSAUGA, Ontario.
L5G 1G7

Dear Sir:

Re: Letter of Understanding No.1

REPLACEMENT EMPLOYEE CALL-IN LISTS

Subject to the relevant provisions of the Collective Agreement, this letter will serve as clarification of the various issues associated with the use of "Replacement Employees".

1. General:

- (a) The parties recognize the existence and use of three types of "Replacement Employee Call-In Lists" for persons called in to work on a temporary basis to replace permanent employees or to satisfy irregular manning requirements of less than three (3) months duration. These lists include:
 - i) Seniority Replacement Employee Call-In List.
 - ii) Non-Seniority Replacement Employee Call-In List.
 - iii) Student Non-Seniority Replacement Employee Call-In List.
- (b) i) It is understood that employees on "Replacement Employee Call-In Lists" will be used to replace permanent full time employees in the positions of Selector and Packer, Pallet Loader, Carton Assembler, Conveyor Loader, Plastishield Attendant (Pallet Loader function).
 - ii) Seniority employees with the capability to perform the functions of these positions who are currently or about to be laid off, may file a written request with the Human Resources Department to be placed on the Seniority Replacement Employee Call-In List indicating their willingness to work in one or more of the above mentioned positions.
- c) Persons called in to work on a temporary basis to replace permanent employees will not be used to fill permanent vacancies until the relevant provisions (Clause 7.15) of the Collective Agreement for filling permanent vacancies have been exhausted.
- d) Employees on the "Replacement Employee Call-In Lists" who fail to work 75% of the offered opportunities to work or who cannot be contacted 50% of the time when called to work, may be removed from the list.
- e) i) Subject to their availability, employees on the "Replacement Employee Call-In Lists" will be called into work on a rotating basis based on their standing on their respective Call-In List.
 - ii) Seniority Replacement Employees will be listed in seniority order (most seniority to least). Non-seniority and Student Replacement Employees will be listed on their respective list on the basis of the date they were placed on those lists.
 - iii) When the need arises to use "Replacement Employees" the Company will refer to the Seniority Replacement Employee Call-In List. When that

has been exhausted, it will proceed with the Non-Seniority and then Student Replacement Employee Call-In List.

iv) A Replacement Employee may be used on a regular basis for the duration of a period of casual absence for up to three (3) months, subject to the provisions of Article 7.17(a).

f) i) Replacement Employees called in to replace permanent full time employees or to satisfy irregular manning requirements will not be subject to the seniority provisions of the Collective Agreement except for Seniority Replacement Employees where specific provisions are provided for in the Collective Agreement.

ii) When used, Replacement Employees will not be subject to layoff notice in accordance with Article 7.11.

iii) It is understood that Seniority Employees called in to work as Replacement Employees will not be considered as Recalled in accordance with Article 7.13.

2. Achievement of Seniority or Recall Status:

a) Seniority employees on layoff who are called in to work as Replacement Employees will be recalled in accordance with the provisions of Article 7.13 when permanent work or temporary work which is expected by the Company to last ten (10) consecutive (work) days or more as [sic] available, subject to Article 7.17(a).

b) i) Subject to Article 4, the need for an additional permanent full time position will be established when a Non-Seniority Replacement Employee works a regular shift schedule, in accordance with 1(e)(iv) above, for a minimum three (3) full months.

ii) When the need is established, the Company will apply the relevant provision of the collective Agreement for filling permanent or temporary vacancies.

iii) If A Non-Seniority Replacement Employee is to be hired permanent full time, the most senior qualified individual on the list will be offered the position. Once hired permanent full time, the individual will be considered a Probationary Employee under the terms of this Collective Agreement and shall be required to complete the appropriate provisions of Article 7.01. Upon successful completion of the probationary period, the individual will be credited with seniority equal to the probationary period served plus one (1) day's seniority for each day worked during the previous twelve (12) months of "on call" employment. For this purpose, at least four (4) hours worked in a day shall constitute one (1) day's work.

c) Seniority shall accumulate for seniority Replacement Employees in accordance with Article 7.09(e).

[Part 3 of the letter pertains to pay rates, benefits, statutory holiday pay, and vacation pay.]

4. The Company will provide the Union with a monthly listing of Replacement Employees, except students, and the total hours worked during the month.

Yours truly,

N. A. Baggio
Plant Manager - Hamlet, a.

7. The purpose of the Company's call-in system is to provide a group of trained employees who can be called in to work when staffing requirements fluctuate on a short-term basis, and when temporary replacements are needed for permanent staff during vacations and other absences of less than three months, such as those caused by illness or injury. Employees who are going to be absent are required to telephone the Company's guardhouse and speak with a security guard (whose services are provided to the Company pursuant to a contract between the Company and a security guard agency). The security guard then contacts the employee's supervisor to ascertain if a replacement is needed. If so, the security guard arranges for a call-in employee to serve as a replacement. As indicated in the letter of understanding, persons on the Seniority Replacement Employee Call-In List are supposed to be the first ones called (on a rotating basis), followed, if necessary, by persons on the Non-Seniority Replacement Employee Call-In List and then by persons on the Student Non-Seniority Replacement Employee Call-In List.

8. The complainant commenced employment with the Company in August of 1990. She assumed, at all material times, that she had been hired as a full-time employee (because she had indicated on her application form that she was seeking full-time employment). However, it is clear from the evidence adduced in these proceedings that her assumption was incorrect, and that she was actually hired on an "as required call-in basis". During her employment interview, she was provided by the Company with a document containing an authorization for Union dues deduction on one side, and various information and acknowledgements on the other side, including the following:

I understand that I have been hired by Consumers Glass on an as required call-in basis and that my employment while on the call-in list is not subject to the seniority provisions of the Collective Agreement.

Furthermore, my employment may be terminated at any time as a casual, call-in, non-seniority employee.

Although the complainant was told to read that document before signing it, in her excitement over obtaining her first job she merely skimmed through it and paid no attention to the above-quoted provisions.

9. After completing ten days of training (during the last two weeks of August of 1990), the complainant worked for only two and a half more weeks (in September) before being laid off. The Company records introduced into evidence at the hearing of this matter indicate that the complainant did not work again until January 31, 1991, and that she worked only two days in February, one day in April, one day in June, and six and a half days in July of that year. They further indicate that of the times that she was called for the purpose of being offered work during the period from September 19, 1990 to July 31, 1991, the complainant was "not home" on fifteen occasions, was "not available" on six occasions, and said "no" on five occasions.

10. The complainant vigorously disputes the accuracy of those records. It was her evidence that she worked far more hours than are shown on those records, and that she was almost always available for work. She acknowledged having declined work on one occasion, when her mother was quite ill and the call offering her work came just as they were leaving for the hospital. However, she denied having declined work at any other time. In support of her contention that the Company's records are inaccurate, the complainant cited instances in which her pay cheques had failed to reflect all of the hours which she had actually worked. It was also her evidence that the telephone at her home very seldom went unanswered as her mother was at home almost all of the time caring for her brother, who was seriously injured in a school bus accident. The complainant further testified that she was very anxious to work as much as possible because her father was an

unemployed construction worker and her family was “living on welfare”. Thus, when she did go out, she always gave her mother a telephone number where she could be reached. Moreover, the complainant did not merely wait to be called in to work, but frequently telephoned the Company’s guardhouse to ask if there was any work available.

11. The complainant also testified that on a number of occasions she was bypassed on the list, with students improperly being given preference for work opportunities. (She did not call any of them as witnesses in these proceedings because some of them were her friends and she feared that they would be terminated by the Company if they testified on her behalf.) She suggested that this occurred as a result of favouritism on the part of the security guards, and because the Company was able to save money by using students whose services were partially paid for by government funding.

12. On or about July 25, 1991, Dolores Elder, the Supervisor of the Company’s Human Resources Department, sent the following letter to the complainant at her home address:

As a result of your unavailability on our call-in list, your name has been removed.

Any monies that may be owing to you will be available during the week of August 10, 1991.

Although that letter is dated July 25, 1991, it is clear from the evidence adduced before the Board in these proceedings that the complainant continued to work for the Company beyond that date. The Company’s “absentee and tardiness record” indicates that she worked four hours on July 26, and eight hours on each of July 29, 30, and 31, 1991. Moreover, the complainant testified that she also worked during the first part of August, until August 10, 1991.

13. The complainant was very upset by that letter as she knew that she had almost always been available for work but had seldom been called. Consequently, she went to the Human Resources Department to ask Ms. Elder why the letter had been sent. Ms. Elder’s initial response was, “You’re fired. That’s all there is to it.” However, when the complainant continued to assert that she knew nothing about being unavailable, Ms. Elder showed her some records which indicated that she had been unavailable even more times than shown by the Company records introduced at the hearing of this matter. When the complainant asserted that the records were inaccurate, Ms. Elder said that the complainant could not argue with what was written in the records.

14. The complainant also spoke with Mr. LaScala about her termination, but was unable to persuade him to rehire her because his review of her situation led him to conclude that his staff had acted properly in removing her from the list, as her attendance record indicated to him that she was “not available during June and July when [the Company] needed her the most”. He also concluded that there had been no violation of the collective agreement or of any applicable legislation.

15. On August 25, 1991, the complainant wrote as follows to the Company’s Plant Manager:

I was hired full time on August 19, 1990. I was laid off later due to reduced orders.

I was periodically called back to work during the year and came on all occasions except one day when my mother was coughing up blood when I refused as we were just leaving for the hospital.

I received your letter of July 25/91 effectively terminating me from a call in list of which I had no knowledge. I worked full time after this date up until and including the week of August 11/91.

I received my pay cheque and found it short sixteen (16) hours. I questioned Dolores Elder who refused to believe this error on your companies [sic] records. However these records were later

found and I received the payments due; one for two days in one period and one for one day short from the previous week.

I also questioned the reason I was considered unavailable believing it to be the emergency day with my mother. Dolores Elder produced a list that indicated I was unavailable many many times.

I was never contacted any of these times nor was my mother who is practically house bound.

My record of employment shows that I worked mostly undesirable shifts and had nothing but positive comments from my supervisors.

It appears that the call in records are false and to that your data collection is not audited nor controlled. Witness the inability to produce proper pay packages.

I have also asked Dolores Elder to let me speak with my union representative and she has thwarted all attempts or they have refused to answer her memos to have Mr. Monaco call me.

To determine the real reason I will attempt to reach my representative at home or by other channels.

Once I have determined the real truth I will contact the Ontario Labour Relations Board and will issue a formal complaint.

A. The union failed to represent me.

B. The company violated my rights in a number of areas....

As a dedicated employee I did not receive the consideration of the weakest student employee and feel like pursuing this injustice.

16. The Company's response is contained in the following letter dated September 16, 1991 from Mr. LaScala to the complainant:

Thank you for your letter dated August 25, 1991. Many of the accusations you made have been investigated and found to be without merit. Our records indicate that you were unavailable for work for a significant number of opportunities during a period when you were most needed. As a result, you were removed from the Call-In List.

It is extremely unfortunate that our employment relationship was unsuccessful at this time. Never-the-less, you are welcome to re-apply at any time and your suitability for employment will be considered with other applicants.

17. That response prompted the complainant to write the following letter to Mr. LaScala:

Thank you for your letter of September 16/91. Please send an application form.

Obviously, the security guard call in procedure is not audited. They can call in whoever they like and fill in N/A not available for those in the front of the list.

I know of students who worked while I waited for a call at home before you removed my name from the list.

This violates Letter of Understanding #1 e) iii.

Article 7 Seniority

I have fulfilled both requirements to pass through the probation period.

I was told that I was hired as a permanent employee.

Unless you can produce documentation that I signed to the contrary I obviously am full time employee.

Attempts to reach my union representatives have been thwarted at every turn and they have not contacted me even though I made calls to their homes.

An employee can lay a complaint with a company on the Labour Relations Board and one can lay a charge against a union for failure to represent a union member.

I think you have a big problem! You could be asked to reinstate me with full back pay, you could be directed to repay all student grants.

You will definitely have to tighten up your procedures.

The olive branch you offer is not acceptable.

18. Mr. Monaco has worked for the Company for thirty-two years, and has been the President of Local 203 for the last year and a half, during which he has continued to hold a full-time position with the Company. Prior to becoming President, Mr. Monaco was Vice-President of the Local for ten years.

19. The Union filed 99 grievances in 1991, and 121 grievances in 1990, on a variety of matters ranging from discharge grievances to one in which the Union grieved the Company's failure to fix potholes in its parking lot. After confirming that the Company has had a call-in list for many years and characterizing its operation under the previous collective agreement as a "total disaster", Mr. Monaco testified that although he "[doesn't] think it's perfect", under the current collective agreement it "works 100% better than it used to". Prior to April of 1990, when the Company wanted to hire a full-time employee, it selected whomever it wished from the call-in list, often bypassing some of the persons who had been on the list the longest in favour of newer employees whom management perceived to be better workers. However, during the last round of negotiations, the Company agreed to the language that appears in paragraph 2(b)(iii) of the above-quoted Letter of Understanding, which provides (in part) that "[i]f a Non-Seniority Replacement Employee is to be hired permanent full-time, the most senior qualified individual on the list will be offered the position."

20. In accordance with the final paragraph of that Letter of Understanding, the Company provides the Union with a monthly list of replacement employees (other than students), and the total number of hours worked by each of them during the month. Mr. Monaco told the Board that he utilizes that information to monitor the Company's use of replacement employees, but does not take any action on behalf of an individual employee unless the employee complains about not being called in to work, because it has been his experience that some of the employees on that list receive unemployment insurance benefits and do not want to have the Union take any action which would interfere with the continuity of those benefits. It was also his evidence that if a call-in employee does complain to him that s/he is not being called in for work, he goes to the guardhouse and checks to ensure that the proper procedures are being followed.

21. When Mr. Monaco arrived at the plant on the morning of the complainant's last day of work, he was approached by another employee who told him that the complainant had been fired and asked him to speak with her. Mr. Monaco agreed to do so, and proceeded to the complainant's work area. During their brief conversation that morning, the complainant told him she was a full-time employee (in accordance with her aforementioned assumption that this was her status with the Company), and that she had been fired after working every day they called her. Mr. Monaco told her, "If that's the case there should be no problem", and undertook to do everything for her that he could. During that conversation the complainant also mentioned some of her family's diffi-

culties. Mr. Monaco then spoke briefly with the complainant's co-workers, who told him that she was a good worker. He also spoke with her foreperson, who said, "When she's here she's a good worker." Although Mr. Monaco interpreted the words "when she's here" as a negative comment, it does not appear that he ever sought clarification from the foreperson about what was actually meant by that statement.

22. Mr. Monaco then proceeded to the office, where Ms. Elder told him that the complainant was not a full-time employee and showed him some attendance records indicating that she could often not be contacted, and that she had declined many of the work opportunities which had been offered to her. When Mr. Monaco asked Ms. Elder to meet with the complainant, she at first refused. However, after he stated that the complainant had "a good excuse why she couldn't get off to work" due to "home problems with her mother and her brother", Ms. Elder agreed to meet with her. Mr. Monaco then asked his secretary to telephone the complainant to inform her that Ms. Elder was willing to meet with her.

23. It was Mr. Monaco's evidence that while leaving work on the following Monday, he encountered the complainant as she was entering the Company's premises and told her: "You weren't full-time. I set up a meeting [for you] to talk to Dolores or John LaScala. They're going to talk to you. Maybe they're going to reinstate you. If they aren't, there is nothing I can do for you." The complainant, on the other hand, testified that no such encounter ever occurred. Since it is possible that this encounter did occur, and that the complainant has forgotten about it because it was so brief and casual in nature that it made no lasting impression upon her, the Board is prepared to give Mr. Monaco the benefit of the doubt in that regard.

24. It is clear from the evidence that following her termination, the complainant made numerous attempts to contact Mr. Monaco for assistance. She repeatedly attempted to telephone him at the plant, the Union office, and his residence, and left numerous requests for him to call her. However, Mr. Monaco ignored all of those requests and never called her back. The complainant's repeated calls did ultimately prompt him to speak with Mr. LaScala about her termination. However, when Mr. La Scala reviewed the complainant's attendance records with him and indicated that the Company was not going to rehire her, Mr. Monaco accepted the Company's decision and did not file a grievance or take any other steps to assist the complainant.

25. On October 5, 1991, the complainant sent the following letter to Mr. Monaco:

Please contact Mr. LaScala in Human Relations regarding a serious problem you have been ignoring.

I am happy that our plant is now relatively secure.

It is time for you to act on my grievance.

I have resisted bringing in the Ontario Labour Relations Board and the Minister.

I will settle for reinstatement full time with seniority back to my original date of hire.

Compensation for lost wages may be waived depending on your expedience.

Mr. Monaco received that letter but did not respond to it. The only explanation which Mr. Monaco offered to the Board for ignoring that letter, and failing to return any of the complainant's telephone calls, was that he "had already explained to her that there was nothing [he] could do for her."

26. In reaching the conclusion that there was nothing the Union could do to assist the com-

plainant, Mr. Monaco took into consideration the following response which the Company, through Mr. LaScala, gave to the Union in respect of three non-seniority replacement employees' unjust termination grievances on June 14, 1991:

Following advice from legal counsel, the Company objects to the filing of these grievances for Non-Seniority Replacement Employees.

Letter of Understanding #1, Section 2(b)(iii) indicates that once a non-seniority replacement employee is hired permanent full time, he will then be considered a Probationary Employee under the terms of our Collective Agreement. This confirms the fact that Replacement Employees are only part time employees who have yet to attain Probationary Employee status.

It follows, then, that if the dismissal of a Probationary Employee is non-arbitrable (see Article 7.02) then the dismissal of a Non-Seniority Replacement Employee is also non-arbitrable.

Furthermore, Section 2(b)(iii) of L.O.U. #1 indicating the Company's intention to offer any permanent full time positions to the "most senior qualified individual on the list" was a result of the 1991 negotiations in which it was emphasized (by the Union and acknowledged by the Company) that individuals found to be unsuitable for employment while on the Call-In list should be removed from the list rather than by-passed for an opportunity for permanent full time employment when it becomes available. It was clearly acknowledged that the Company has the right to [sic] use it's [sic] discretion on whom it retains on the call-in list.

As a result, this will advise you that the Company will not entertain any grievances related to the dismissal of Non-Seniority Replacement employees.

27. After discussing the Company's response to those grievances with a representative of the International, Mr. Monaco dropped them because he was of the opinion that they would not succeed at arbitration. During his testimony before the Board, Mr. Monaco also noted that the Company's records indicated that even if the complainant had been hired as a full-time employee, she would have been a probationary employee at the time of her discharge as the Company's records indicated that she had only worked a total of thirty-four days, which is eleven less than the "forty-five (45) working days of intermittent employment within any twelve (12) consecutive calendar months" required under Article 7.01(a) for completion of the probationary period.

28. Section 69 of the Act provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

29. In the instant case, there is no evidence of "discrimination" or "bad faith". Thus, the issue is whether the Union, through its President Marco Monaco, acted in a manner that was "arbitrary" in the representation of the complainant. In commenting on the scope of that term, the Board wrote, in part, as follows in *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001:

18. Bad faith, malice, discrimination, or subjective ill will are clearly proscribed and readily ascertainable; the real difficulty is to determine when a union's conduct may be properly regarded as "arbitrary" - bearing in mind that the union's affairs may be conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure. While the Legislature undoubtedly sought to protect the employee from an abuse of the union's authority, I do not think it was intended that every miscalculation, honest mistake, or error in judgment would constitute a breach of a public statute. The standard to which a union must adhere was described in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 as follows (at paragraph 40):

"40. In deciding whether a union has violated the Act the standards to be applied are

important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having had the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546.”

Similar views were expressed in *Re: Ontario Hydro Employees' Union - CUPE Local 1000 and Walter Prinesdomu*, [1975] OLRB Rep. May 444, at p. 462ff, in a long passage which canvassed the intended meaning of the word “arbitrary”:

“In using the word arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent's particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word “perfunctory” and observed that a trade union in a non arbitrary manner [must] make decisions as to the merits of particular grievances”. It could be said that this description of the duty requires the exclusive bargaining agent to put “its mind” to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness....

On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section 60 [now section 69]. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances - errors consistent with a “not caring” attitude - must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct.

19. It is clear that in order to establish a breach of section [69], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a “flagrant error” consistent with a “non caring attitude”, or have acted in a manner that is “implausible” or “so reckless as to be unworthy of protection”. In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

30. See also *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, at paragraphs 36 to 39:

36. Section [69] requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of a single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at his decision. His ability to recall and articulate what took place in his mind may be influenced, sub-consciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With [this] thinking process hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the resulting interpretation of facts or of a collective agreement is found by the Board to be "reasonable" (*Clifford Renaud*, [1976] OLRB Rep. Jan. 967, ¶22; *Jay Sussman*, [1976] OLRB Rep. July 349 ¶11; *I.T.E. Industries Limited* [1980] OLRB Rep. July 1001, ¶20), "not unreasonable" (*Ivan Pleikos*, [1977] OLRB Rep. November 776, ¶3), "not open to challenge" (*Oil, Chemical & Atomic Workers International Union and its Local 9-698*, [1972] OLRB Rep. May 521, ¶3), or at least "not implausible" (*Canadian Union of Public Employees Local 1000 - Ontario Hydro Employees Union*, [1975] OLRB Rep. May 444, ¶32), then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers "patent" and arrives at an "almost perverse" understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from "directing its mind to the real question", and that in so doing it has acted in an arbitrary fashion: *The Corporation of the County of Hastings*, [1976] OLRB Rep. November 1072, ¶22. Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *Canadian Union of Public Employees Local 2327*, [1981] OLRB Rep. June 623, ¶30; *Swing Stage Ltd. re Alvin Plummer*, [1983] OLRB Rep. Nov. 1920.

See also *Perino Smith*, [1991] OLRB Rep. July 912; *Bujalski Włodzimierz (Walter)*, [1991] OLRB Rep. June 735; *Maria Mlaker*, [1989] OLRB Rep. Nov. 1246; and *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401.

31. In the circumstances of the instant case, reference may also usefully be made to *Softley Cartage Limited*, [1982] OLRB Rep. May 766, in which the Board wrote as follows concerning the effect of a trade union's failure to at least attempt to meet reasonable standards of communication with an aggrieved employee:

29. ...the Board would note that a failure by a trade union to meet reasonable standards of communication with aggrieved employees that it represents, at least in terms of the *efforts* that it makes, can operate to the trade union's prejudice in a number of significant ways. A failure to consult may, in the first place, cut the trade union off from relevant facts or questions which it is the trade union's duty to consider in order to meet the non-"arbitrary" standard of the duty of fair representation. Or the mere unwillingness [or] lack of effort to communicate, if unreasonable, may in itself point in the direction of conduct which is arbitrary, discriminatory or in bad faith, and cause the Board to view with particular attention the actual level of representation afforded by the trade union. And short, even, of these possibilities, such conduct on the part of a trade union may involve it in lengthy and expensive proceedings before the Board which, through just a little more care in communicating, could conceivably have been avoided....

32. Having carefully considered all of the evidence and the submissions of the parties, the Board has concluded that the Union, through Mr. Monaco, has contravened section 69 in the circumstances of this case. As indicated above, the only feedback which Mr. Monaco gave the complainant concerning his handling of her concerns regarding her termination occurred during a chance encounter which was so brief and casual that the complainant has no memory of it. His failure to respond to her letter and to any of her numerous telephone calls to him was highly unreasonable and demonstrated a "not caring" attitude to the complainant's concerns. Moreover, it cut him off from relevant facts which it was the Union's duty to consider in order to meet the non-arbitrary standard of the duty of fair representation. It is evident (from what he subsequently told Ms. Elder) that Mr. Monaco came away from his brief meeting with the complainant on her final day of work under the mistaken impression that she had mentioned her "home problems" with her mother and her brother in order to indicate that she had a valid excuse for being unavailable for work. However, had Mr. Monaco returned even one of the complainant's many calls and listened to her concerns, he would undoubtedly have realized that the significance of her mother being essentially housebound as a result of her brother's injuries was that it rendered it very unlikely that the telephone would have gone unanswered if the security guards had in fact telephoned her home with offers of work on the numerous occasions indicated in the Company's records. It would also have impressed upon him the unlikelihood that a person in the complainant's economic circumstances would have failed to make herself readily available to accept offers of work from the Company. Speaking with the complainant would also have alerted Mr. Monaco to the fact that she was challenging the accuracy of the Company's records, and would likely have prompted him to investigate the validity of her position by checking to determine whether or not the security guards had been following the proper procedures. A more thorough and less perfunctory review of the complainant's situation might also have prompted Mr. Monaco to recognize that it is at least arguable that the Company does not have an unfettered right to terminate non-seniority replacement employees in view of Article 4.01(b), which only empowers management to "discharge for just cause", and paragraph "d" of Letter of Understanding No.1, which only empowers management to remove employees from the Replacement Employee Call-In Lists where they "fail to work 75% of the offered opportunities to work" or where they "cannot be contacted fifty per cent of the time when called to work". Moreover, quite apart from the arbitrability of a grievance pertaining to the discharge of a non-seniority call-in employee (which may be problematic in view of the provisions of Articles 5.14 and 7.02), it is likely that the Company would have agreed to restore the complainant's name to the Non-Seniority Replacement Employee Call-In List if Mr. Monaco had properly investigated her concerns and, on the basis of the information gleaned through that process, persuaded Mr. LaScala (who impressed the Board as a relatively fair-minded individual) that she should not have been removed from the list. (To the extent that the complainant was seeking "reinstatement full time with seniority back to [her] original date of hire", she was clearly not entitled to that relief, as she had never in fact held a full-time position, nor attained seniority.) Thus, although Mr. Monaco did take some steps with a view to assisting the complainant, his arbitrary failure to even attempt to meet a reasonable standard of communication with her cut him off from relevant facts and information which it was the Union's duty to consider, in order to fulfill its legal

obligation to represent her in a non-arbitrary manner. Further evidence of the perfunctory manner in which Mr. Monaco dealt with the complainant's concerns is provided by his failure to even file a grievance on her behalf, and by his reliance upon what he took to be a negative comment by her foreperson, without ever seeking to clarify what was actually meant.

33. For the foregoing reasons, the Board finds and hereby declares that the respondent trade union has contravened section 69 of the *Labour Relations Act* in the manner described above. Since the parties' submissions were confined almost entirely to the issue of whether the Act had been contravened, and provided the Board with no real assistance in determining what the appropriate remedial relief would be in the circumstances of this case, the Board has decided to defer any further consideration of that issue until after the parties have had an opportunity to attempt to resolve the matter in a manner mutually acceptable to them. In the event that they are unable to do so, the Board, having remained seized of this matter, will schedule a further hearing at the written request of any of the parties, for the purpose of determining the appropriate remedial relief to be awarded to the complainant.

0204-91-G Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007, Applicant v. **E. S. Fox Limited**, Respondent

Construction Industry - Construction Industry Grievance - Settlement - Labour-Management Relations Committee hearing grievance at Step 3 of grievance procedure and issuing decision - Union submitting that matter in dispute thereby settled pursuant to grievance procedure set out in collective agreement - Board upholding union's preliminary motion, concluding that grievance settled, and directing employer to comply with terms of settlement

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *T. Hawtin* and *Fred Vormittag* for the applicant; *W. J. McNaughton* and *H. Miron* for the respondent.

DECISION OF VICE-CHAIR JANICE JOHNSTON AND BOARD MEMBER, B. L. ARMSTRONG; January 10, 1992

1. The name of the respondent is amended to read: "E. S. Fox Limited".
2. The applicant, the Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007 has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination pursuant to section 126 [formerly section 124] of the *Labour Relations Act* (the "Act").
3. The respondent, E. S. Fox Limited ("Fox") did not dispute that it was bound to the current provincial collective agreement between the Association of Millwrighting Contractors of Ontario Inc. (the designated employer bargaining agency hereinafter referred to as the Association) and the Millwright District Council of Ontario (the designated employee bargaining agency hereinafter referred to as the Council) governing work in the industrial, commercial and institutional sector of the Construction Industry within the province (the "collective agreement"). The

respondent's name appears in the membership list at the end of the collective agreement. The respondent did not dispute that it is a member of the association.

4. The grievance in this case deals with an alleged violation of the collective agreement by Fox in that Fox did not pay travel time in accordance with article 17(a) of the collective agreement. The grievance itself was not placed before the Board however there was no dispute as to its existence. The parties agreed that it had originated sometime prior to August, 1990.

5. It was the position of the applicant in this case that the matter in dispute between the parties had been settled pursuant to the grievance procedures set out in the collective agreement. This issue was raised as a preliminary matter to be dealt with by the Board. After having given the parties the opportunity to outline their positions, the Board moved directly to argument. No one sought to adduce any evidence.

6. The relevant provisions of the collective agreement state:

Article Two

UNION SECURITY AND RECOGNITION

• • •

(h) The Association recognizes the Council as the sole and exclusive Collective Bargaining Agency for all Employees as defined in Article One of this Agreement in all matters pertaining to wages, hours of work and all other working conditions, and conditions of employment.

The Council recognizes the Association as the sole and exclusive Collective Bargaining Agency for the Employer in the unit of Employers for whom the Association has been accredited in all matters pertaining to wages, hours of work, and all other working conditions and conditions of employment.

• • •

Article Eleven

GRIEVANCE PROCEDURE

(a) Where a difference arises between the parties hereto, or between any of the parties hereto, and any person upon whom this Agreement is binding, relative to the interpretation, application or administration of this Agreement, including any question as to whether the matter is arbitrable, or where an allegation is made that this Agreement has been violated, the matter shall be adjusted as follows:

It is generally understood that there is no grievance until an opportunity is given to adjust a complaint. All complaints must be filed within a period of two (2) weeks from the commencement of the circumstances from which the complaint arose. A period of three (3) working days shall be allowed to adjust a complaint before proceeding to Step One of the Grievance Procedure failing a satisfactory adjustment.

Step One

The Representative of the affiliated Local Union and the General Superintendent on the job shall endeavour to settle the matter by negotiations between them. In the event that the matter cannot be settled within a period of one (1) regular working day, then the matter shall be referred to Step Two.

Step Two

After exhausting the procedure set out in Step One and before submitting the matter in dispute to Arbitration, the aggrieved party shall submit a report in writing to the other party, and an attempt to settle the matter shall be made within three (3) days of receipt of the letter by direct negotiation between them and/or their designated Representative.

Step Three

If the matter is not settled in Step Two the complaining party shall rever [sic] the written complaint forthwith to the Labour-Management Relations Committee of the Association and the Council. Both parties shall be entitled to have representatives at the meetings of this Committee to present their side of the matter.

The Committee shall consist of three (3) members from the Association and three (3) members from the Council. No member directly involved in the Grievance shall sit on the Committee.

If the Labour-Management Relations Committee fails to resolve the matter to the satisfaction of both parties within a period of two weeks from the time the written complaint was received by the Committee or such further period as may be agreed upon between the parties, this step shall be deemed to have been complied with.

A decision of the Labour-Management Committee in favour of the Union or the Association may be enforced by the Union or the Association by filing of the Grievances and the Decision with the Ontario Labour Relations Board pursuant to Section 124 [now section 126] of the Ontario Labour Relations Act (any successor section).

(b) Any Agreement arrived at between the Parties during, or subsequent to the above step shall be binding upon both parties and on the persons concerned.

(c) Should either of the Parties to this Agreement have a misunderstanding, complaint or dispute under this Agreement against the other party, a period of two (2) weeks shall be allowed to adjust the said misunderstanding, complaint or dispute and failing a satisfactory adjustment, the Grievance Procedure shall commence with Step Three and this procedure must not be unduly delayed.

(d) It is agreed by both parties to this Agreement that no complaint or dispute under this Agreement may be submitted to Arbitration until after exhausting the above Grievance Procedure in connection with it.

Failing settlement as outlined above, the matter shall then be submitted to Arbitration in accordance with the provisions of Article Twelve.

All time limits mentioned in the Grievance and the Arbitration proceedings may be extended by written mutual agreement between the parties.

No Grievance or Arbitration shall be invalidated by reason of the time limits mentioned or by reason of any defect or form or by any technical irregularity, however, unwarranted or unnecessary delays will not be accepted.

So that better continuity and communication be maintained, the Association requires that a copy of all Grievances sent to either a Contractor or the Labour Relations Board under Section 124 [now section 126] or any other Section of the Act, be forwarded to the Association.

7. Article 11 provides that if the individual employer and local union are unable to resolve the matter at Step One of the grievance procedure it shall then be referred to Step Two of the grievance procedure. Where no resolution results at Step Two, as occurred here, it shall be referred to Step Three. Step Three is the referral to the Labour-Management Relations Committee (the "Committee") which is composed of 3 members from the Association and 3 members from the Council. The parties to the case before us agreed that this matter had been heard at Step

Three of the grievance procedure and that the Committee had issued a decision in this case. That decision was attached to the Form 104 (Referral of Grievance to Arbitration under Section 126, Construction Industry) as Schedule "A". It states:

SCHEDULE "A"

MINUTES OF LABOUR-MANAGEMENT COMMITTEE MEETING
HELD TUESDAY, JANUARY 29th, 1991, AT THE CONSTELLATION
HOTEL:

Meeting held to deal with Grievance filed by Local Union 1007, Niagara Falls, against E.S. Fox Ltd.

In attendance were:

FOR THE ASSOCIATION:

Ken Niepage
Paul Mesley
Henry Franzen

FOR THE UNION:

Harvey Jardine:
John Irvine:
Edward P. Ryan:

Representing the Union was Business Representative of Local Union 1007, Mr. Fred Vormitag.

Representing the Company were Mr. Mike Whittaker and Mr. Henry Miron.

The Union alleged violation of Article 17, Section (a) of the Collective Agreement in that the Company had failed to pay travel time on the Page Hersey project in Welland Ontario, and claimed all travel allowance due all Millwrights employed on the project.

The Company stated that they had never paid travel to that particular project, and they used the Allenburg Post Office as the focal point in estimating travel.

The Union stated that when the Local had moved from St. Catharines to Thorold it used the Municipal Building in Thorold to calculate travel, and all Contractors working on this project for the past number of years have paid travel.

This issue had been dealt with on a previous occasion by a joint Committee of the Association and the Union whose decision was that travel was applicable on that particular job.

DECISION OF COMMITTEE:

The Committee decided that in accordance with Article 17, Section (a) travel is calculated from the City Hall, Town Hall, or Municipal Buildings of the Municipality, District or Township where the Local Union office is situated.

Therefore, the Committee ruled that all Employees on the Page Hersey would be paid travel at \$5.20 per day from the start of the project.

FOR THE ASSOCIATION:

"Ken Niepage"

"H. Franzen"

"P. Mesley"

FOR THE UNION:

"John Irvine"

"H. Jardine"

"Edward P. Ryan"

8. It was the position of counsel for the applicant, that this document was a "settlement decision" issued in accordance with Step three of the grievance procedure, and as such was binding on the employer. He asserted that the procedures in the collective agreement make it clear that the

Committee has the authority to settle the grievance. It was Counsel's position that if there was a problem implementing the decision of the Committee, that the decision could be enforced by the Board.

9. It was the position of counsel for the respondent, that a "settlement" within the meaning of the language in the collective agreement had not been reached. It was his position that the word "parties" in the sentence "... fails to resolve the matter to the satisfaction of both parties ..." referred to the individual contractor and the local union. In other words, if Fox did not agree with the decision rendered by the Committee at Step 3, then there was no settlement. It was his submission that unless there was a settlement to the satisfaction of Fox, there was no "settlement" and therefore there was no "decision" which could be enforced by the Board. Counsel indicated that if the Committee had the authority to make a final and binding decision then there would be no need for a grievance arbitration process. The Committee would assume the role of an arbitrator and no access to arbitration would be possible. He contended that this would be against the Act which requires that every collective agreement provide for the final and binding settlement of grievances by arbitration.

10. Counsel for the respondent referred to *Beckett Elevator Company Limited*, [1982] OLRB Rep. Sept. 1244 and the reconsideration of that decision at [1983] OLRB Rep. March 309. It was his position that the Board in dealing with a clause giving authority to representatives of the employer bargaining agency to settle grievances filed against individual contractors, similar to the one in our case, made it clear that a clause which purports to deny the access of a "party" to arbitration is unenforceable. It was his position that as the decision of the Committee in the case before us had that effect, that it too was unenforceable.

11. In response, counsel for the applicant argued that the *Beckett case* could be distinguished on its facts. In the *Beckett case*, the individual employer Beckett, was a member of the Canadian Elevators Contractors Association ("CECA") an association which had no bargaining status for the purposes of the Act. A rival employer association, the National Elevator and Escalator Association ("NEEA") had been designated as the sole employer bargaining agency in the elevator industry and therefore did have bargaining status. Beckett, although not a member of NEEA, was bound by the industry collective agreement negotiated by NEEA. In our case, there is no competing employer association and Fox is a member of the Association of Millwrighting Contractors of Ontario, Inc. (the "Association"). Counsel pointed out, and this was not disputed by the respondent, that Fox has willingly participated in the process outlined in Step Three before, and has delegated authority to resolve grievances to the Committee.

12. Counsel for the applicant also argued that although the Board in *Beckett* focused on section 145 [formerly section 143], they did not consider section 139 [formerly section 137] of the Act. Section 139(d) and (e) and section 143(a) provide:

139.-(1) In this section and in sections 137 [formerly section 135] and 140 [formerly section 138] to 154 [formerly section 151],

"employer bargaining agency" means an employers' organization or group of employers' organizations formed for purposes that include the representation of employers in bargaining;

"provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by

the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119 [formerly section 117].

145. Where an employer bargaining agency has been designated under section 141 [formerly section 130] or accredited under section 143 [formerly section 141] to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement; and
- (b) an accreditation heretofore made under section 129 [formerly section 127] of an employers' organization as bargaining agent of the employers in the industrial, commercial and institutional sector of the construction industry, referred to in the definition of "sector" in section 119, [formerly 117] represented or to be represented by the employer bargaining agency is null and void from the time of such designation under section 141 or accreditation under section 143.

13. It was Counsel for the applicant's position that although the role of the Association was primarily to conduct collective bargaining, it could have another purpose such as the role carried out by the Committee at Step Three of the grievance procedure in this case. Section 139(e) [formerly 137(e)] states that a collective agreement may contain provisions respecting "the rights, privileges or duties of the employer bargaining agency". In this case counsel asserted that the employer Fox, a member of the Association, has agreed to a provision in the collective agreement which gives the Association, through its Committee, authority to settle grievances. Fox is bound by statute to allow the association to negotiate on its behalf and must be bound by the collective agreement so negotiated.

Decision

14. This collective agreement, as set out in the title or cover page to the Agreement, is between the Association of Millwrighting Contractors of Ontario, Inc. and the Millwright District Council of Ontario. Sections 144 [formerly 142 and 148(1)(2) [formerly section 146(1)(2)]] of the Act state:

144. Where an employee bargaining agency has been designated under section 141 or certified under section 142 [formerly section 140] to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement.

148.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 141 and 147, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

Therefore, by statutory requirement the only signatories to the provincial agreement are the Asso-

ciation and the Council. In accordance with the statutory framework governing the construction industry in Ontario, E. S. Fox cannot be a signatory to the provincial agreement. The Act provides that the Association and the Council are the entities empowered to negotiate collective agreements on behalf of local employers and local unions.

15. We were unable to find any clause (nor was any clause pointed out to us by counsel) in the collective agreement placed before us, defining the term “parties”. There is nothing in the agreement which states that when the term “parties” is used in the grievance procedure that it shall mean anything other than the parties to the provincial collective agreement, the Association and the Council. Nevertheless, when Article Eleven is read in its entirety we are satisfied that individual employers and local unions are “parties” in the sense that they can file grievances and negotiate at Step One of the grievance procedure in an attempt to settle the matter. If the matter is not resolved at Step One or Step Two it proceeds to Step Three. We are satisfied that Fox is a “party” at Step Three to the extent that it is entitled to be represented at the Committee’s meeting(s). We do not accept counsel for the respondent’s submissions that before a matter can be settled at Step Three and a decision of the Committee issued, the individual employer and local union must agree with the decision. The effect of the Committee’s decision is to resolve the grievance. The final paragraph under Step Three makes it clear that the Committee has the authority to issue a decision. This is not qualified by any language requiring the consent or agreement of the individual employer or local union.

16. In this case there was no allegation raised by either of the local parties that the Association or the Council, or their spokespersons on the Committee, had acted in a manner that was arbitrary, discriminatory or in bad faith. Nor was there any suggestion of collusion on the part of the Association or the Council or the members of the Committee (see section 151 of the Act). In the absence of such factors, we should not lightly interfere with the mechanism for the resolution of disputes which the parties have negotiated into their collective agreement.

17. In the *Beckett* case the relevant language in the collective agreement reads as follows:

Article 14

GRIEVANCE AND ARBITRATION

14.01 Any difference of dispute regarding the application or interpretation of this Agreement or Local Agreements shall be settled locally between the Local Union and the Employer. Upon receipt of a written grievance the Employer Representative and the Union Representative shall meet within five (5) working days to settle the dispute. *In the event the matter cannot be settled on a local basis, then either the Union or the Employer shall submit the dispute to the Joint Industry Committee which it is hereby understood and agreed shall have the power to enforce its decision by mutual consent for protection of the public and the entire elevator industry.*

14.02 Within a period of seven (7) days after receipt of a dispute or grievance by the Joint Industry Committee, said Committee shall meet. If the Joint Industry Committee is unable to reach a decision or is deadlocked on the issue, then within a period three (3) days thereafter, either party may submit the unresolved dispute to arbitration.

14.03 It is agreed that the Employers and the Unions may mutually agree to a permanent Impartial Arbitrator or panel of permanent Impartial Arbitrators for resolution of differences or disputes. *It is agreed that the Employers and the Unions may agree to waive the Joint Industry Committee step in the above procedure and may submit an unresolved difference or dispute directly to an impartial Arbitrator.*

14.04 It is understood that neither the Joint Industry Committee nor the Impartial Arbitrator shall have any power to add to, subtract from, or modify in any way any of the provisions of this Agreement.

14.05 The decision of the Impartial Arbitrator shall be final and binding upon all parties. The expenses of the Imperial [sic] Arbitrator shall be borne equally by both parties.

14.06 It is agreed that the time limits expressed in this Article may be extended by mutual consent of the parties.

[emphasis added]

The language in the provincial collective agreement before us appears to give the Committee the authority to settle the grievances filed against individual employers such as Fox, by local union's such as Local 1007. The language is not at all similar to the collective agreement language in the *Beckett* case, as the parties to the provincial agreement (the Association and the Council) placed before us have gone one step further and agreed to a provision providing either party with an "enforcement" mechanism that is not dependent on mutual consent. The language in the provincial collective agreement before us provides that the Board has the authority to enforce a decision of the Committee, if either party refers the matter to it. The wording in the "enforcement" paragraph of article eleven does not stipulate that the Board may only enforce the decisions of the Committee upon mutual consent. Once the Committee has issued a decision either party may refer this decision to the Board for enforcement. The applicant herein, the Council, is clearly a "party" in this sense. The Board in the decision in which it reconsidered its original ruling in the *Beckett* case, pointed out that the language in that particular collective agreement did not provide for enforceability of the decision of the JIC except by "mutual consent" (see paragraphs 10 and 11). That is not the case in the situation before us where either party may file the grievance and the settlement reflected by the decision of the Committee, to the Board for enforcement. Thus the language in the provincial collective agreement before us is quite different from and may be distinguished from the language in *Beckett*.

18. The company submits that a clause which purports to deny the access of a party to arbitration is unenforceable. It took the position that the *Labour Relations Act* requires that all grievances be settled by arbitration. Section 124 does not require that every grievance filed with the employer or union (as the case may be) must lead to arbitration, only that those remaining unsettled are to be resolved through arbitration. The decision of the Committee in our case reflects a resolution of the grievance reached during the grievance procedure. The Committee was not "arbitrating" within the meaning of the Act as alleged by counsel for the respondent, but simply reached a settlement. As a result of this settlement at Step Three of the grievance procedure there was nothing to arbitrate. Here, the company participated in the internal grievance procedure set up in the collective agreement. Only after the matter has been settled through that procedure does it now complain. Even so, no grievance dealing with the merits of the dispute has been filed by the company, nor has it filed a section 126 [formerly section 124] application. Rather, this Board, sitting as an arbitration board under section 126, is asked to apply the specific term in the collective agreement that directs the Board to enforce settlements reached thereunder. In these circumstances we see no reason not to enforce the settlement, as the collective agreement requires. To do so is not, in the circumstances, contrary to the parties' statutory rights.

19. In *Beckett* the Board observed (in paragraphs 17 and 18) that at the time the Act was amended to provide for province-wide bargaining, the legislature intended that the role of the central bodies was to conduct bargaining and conclude a collective agreement. In *Beckett* the Board concluded that this was the only role intended for the central bodies. There is nothing in the Act however which prevents the central bodies, the Association and the Council, from negotiating language into the collective agreement providing for a joint committee or labour management committee as they did in this case. In the Board's experience, these kinds of committees are found in many of the province-wide collective agreements governing the other trades. This type of commit-

tee is an extremely effective and inexpensive mechanism for dispute resolution. In this case Fox participated in the Committee meeting. It was not disputed that it has willingly participated in this process before and did so in this case. Unfortunately in this case it did not like the result and now wants to argue that the Committee has no authority.

20. The Board in *Beckett* in determining that the employer bargaining agency should not have the power to settle the individual employers grievance relied on sections 144 and 145 of the Act. Section 139 of the Act was not raised in *Beckett* and the Board did not therefore consider it. Section 139(d) and (e) make it clear that provincial collective agreements may contain provisions respecting "...the rights, privileges or duties of the employer bargaining agency ...". These "rights, privileges or duties", include the representations of employers in bargaining but are not restricted so as to pertain *only* to the negotiation of collective agreements. To restrict the application of the language in section 139 to the negotiation process would therefore render it meaningless, as by statute the Association has the right to negotiate the provincial collective agreement. Section 145(a) sets out or limits the extent of the statutory transfer of powers to the central bodies. Any other transfer of rights or powers must be achieved through the negotiation process. The provincial collective agreement may contain articles that give the employer or the employee bargaining agency rights beyond the right to bargain for and conclude a provincial agreement, provided they are consistent with the statutory scheme. In creating the Committee, which consists of representatives of the two central bodies, that is what has been done in this case.

21. In the *Beckett Elevator Company* case, [1983] OLRB Rep. March 309 (the reconsideration of the case we have referred to as the *Beckett* case) the Board after noting the statutory limitation set out in section 145(a) went on to say:

...

For the purposes of this case we need not speculate on the factual or contractual circumstances which might prompt the Board to give binding effect to a body such as the J.I.C. [Joint Industry Committee], nor should our decision be interpreted as a signal that the Board is anxious to deal with problems which traditionally have been, and probably should be, resolved in another less formal forum. But we do not think that this J.I.C., under this agreement, in these circumstances, has given an interpretation of the parties' collective agreement which the Board must merely enforce. ...

...

The contractual circumstances in this case are quite different from those in *Beckett*. *Beckett* did not deal with "contractual circumstances which might prompt the Board to give binding effect to a body such as the JIC ...". The issue before us is whether those contractual circumstances are present here. There is no doubt given the statutory framework (see for example section 139(d) and (e), section 145, 149 [formerly section 147]) that the employer and employee bargaining agencies can negotiate into their collective agreement provisions for a JIC as they did in this case. In the circumstances of the case before us and for the reasons outlined in paragraph 15, we feel it is important to give effect to the collective agreement language. Fox participated in the Committee meeting and now seeks to resile from the settlement reached at the meeting. Signatories to the collective agreement, in this case the Association and the Council, have freely negotiated the current language in the collective agreement. This type of clause, providing for a joint committee, is common in the construction industry and the Board should be reluctant to interfere with a process which has been agreed to by the parties. Stability in labour relations is very important and the Board should tread lightly in making decisions which could upset an ongoing relationship. In our view, it is appropriate to enforce the decision of the Committee settling this matter at Step Three of the grievance procedure.

22. The Board upholds the preliminary motion of the applicant and concludes that the grievance before us has been settled. That settlement is binding on the respondent. The respondent is directed to comply with its terms.

23. In the event that the parties should encounter any difficulties in implementing this award, the panel will remain seized.

DECISION OF BOARD MEMBER J. A. RUNDLE; January 10, 1992

1. The concept of an internal labour management relations committee whereby the parties try to resolve their problems internally is not novel. While no evidence was placed before the panel, it is my understanding, that many contracts in the construction industry make provision for an internal dispute resolution procedure. There was also no evidence placed before the panel to indicate that the specific language with respect to the Labour-Management Relations Committee contained in the collective agreement between the Association of Millwrighting Contractors of Ontario, Inc. and the Millwright District Council of Ontario, was found in any other collective agreement in the construction industry. While I agree that it is in the best interests of parties to a collective agreement to resolve matters amongst themselves without having to resort to litigation - I will not support an internal scheme that denies parties access to their full rights under the *Labour Relations Act* which in my view is the result of this decision. For the following reasons I dissent.

2. The issue before this panel of the Board was whether the matter in dispute (a grievance over the payment of travel time) had been resolved pursuant to the grievance procedure set out in the collective agreement. In order to determine this matter one must interpret the relevant contract language.

3. The majority in paragraph 14 states: "We are unable to find any clause in the collective agreement placed before us defining the term 'parties'." With respect I disagree. *Article Eleven, Grievance Procedure (a)* reads as follows:

"Where a difference arises between the parties hereto, or between any of the parties hereto, and any person upon whom this Agreement is binding..."

[emphasis added]

One has to ask why the parties would include this language. It is there, I suggest, because there is an acknowledgement that there are more than two "parties", the "Association" and the "Council" as the majority have found. Reading further - *Step Two* of the grievance procedure states as follows:

"After exhausting the procedure set out in Step One and before submitting the matter in dispute to Arbitration, the aggrieved party shall submit a report in writing to the other party, and an attempt to settle the matter shall be made within (3) days of receipt of the letter by direct negotiation between them and/or their designated representative.

[emphasis added]

The "aggrieved party" in Step Two can only refer to the "local company" or the "local union" not the Association or the Council. Prior to going to Arbitration a step which is clearly contemplated by the grievance language, the "local parties" have an opportunity to attempt to resolve the matter. If there is no resolution of the dispute the matter is referred to Step Three which states:

"If the matter is not settled in Step Two *the complaining party* shall refer the written complaint forthwith to the Labour-Management Relations Committee of the Association and the Council..."

[emphasis added]

The "complaining party" is one of the local parties as noted in Step Two of the Grievance Procedure, not the "Association" or the "Council". Indeed Step Three also refers to the Labour Management Relations Committee of the Association and the Council - these entities are not referred to as "parties" to the dispute. Step Three goes on to say:

If the Labour-Management Relations Committee fails to resolve the matter to the satisfaction of *both parties*...

[emphasis added]

From this language it is clear that "both parties" refer to the "local union" and the "local contractor" who must be satisfied with the resolution. To read the language otherwise is inconsistent with the way the Article was drafted. It is the "local parties" who are engaged in the dispute and who have to be satisfied with the resolution. This interpretation of the Agreement is not prejudicial to either party - however to interpret this Article differently gives rise to draconian labour relations practices which can impact quite negatively on either a local contractor or a local union:

Step Three goes on to say:

"A decision of the *Labour-Management Committee in favour of the Union or the Association* may be enforced by the Union or the Association by filing of the Grievances and the decision with the Ontario Labour Relations Board pursuant to section 124 of the *Ontario Labour Relations Act* (any successor)."

[emphasis added]

This is the first occasion in the grievance procedure where we see as separate entities the "Union" (not council) and the "Association" not "parties". This language would refer to broad policy matters that are the subject of dispute between the "Association and the Council". The specific use of the words "Union" and "Association" were deliberate and set this paragraph apart from the previous paragraphs. This paragraph is simply a substitution for the enforcement section under the *Labour Relations Act* - that is all it means. It *does not* however mean that the Labour Management Relations Committee can make any decision it wants and those decisions are therefore binding on the parties - there are limits.

Step Three(b) reads:

Any *Agreement arrived at between the parties* during or subsequent to the above step shall be binding *upon both parties* and on the persons concerned...

[emphasis added]

This section refers to any *agreement* - not *decision* - arrived at between the "local parties". In the case before us E.S. Fox was not in agreement with the resolution of the Labour-Management Relations Committee - therefore there is no agreement. The decision of the Labour-Management Relations Committee is not an agreement therefore it is *not* in my opinion binding on the parties.

4. For the above noted reasons I do not agree with the majority's interpretation of the language in the Collective Agreement. In my view, the majority's interpretation causes me concerns

which have very serious labour relations implications for both local unions and local contractors. Step Three describes the composition of the Labour-Management Relations Committee as follows:

"The Committee shall consist of three (3) members from the Association and three (3) members from the Council. No member directly involved in the Grievance shall sit on the Committee."

[emphasis added]

Also Section 45 [formerly Section 44] of the *Labour Relations Act* states as follows:

- (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration, or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

...

5. The scheme of the Act is that all parties, including an employer bound by operation of law to a provincial agreement, have the right to an *impartial* arbitrator, or board, in dealing with a grievance alleging violation of a provincial collective agreement. It is very clear that the "Committee" in this case that rendered a "decision" does not qualify as an impartial board. The "Committee" is composed of three (3) members from the "Association" and an equal number from the "Council". As counsel for the Respondent pointed out the three (3) members of the Association on this committee would all be contractors and competitors of E.S. Fox who may have been unsuccessful bidders for the job giving rise to the dispute. While there were no accusations of impropriety in this case, counsel for the Respondent properly raised the concern of unsuccessful competitors being in a position to influence the final cost of a project by a decision of the Labour-Management Relations Committee against the contractor on the job. While the same scenario may not exist on the "Council" side, the process is open to abuse that can impact negatively on a local union. The "Committee" cannot therefore be deemed impartial and as such does not meet the statutory requirement of Section 45 of the *Labour Relations Act*.

6. In *Ontario Hydro and Ontario Hydro Employees' Union, Local 1000 et al* (1983), 41 O.R. (2d) 669 (C.A.), Ontario Hydro sought to set aside a decision of a Board of Arbitration which conferred the right to arbitrate their discharge on probationary employees even though the collective agreement precluded them from doing so. The appeal was dismissed. The Court of Appeal determined that any provision in the agreement which blocks resort to arbitration to determine the right is void as contrary to Section 45. The case before us is another fashion of the same problem. How then can the "Association" and the "Council" (the bargaining agents) agree to dispose of that right in this case anymore than they would in the Ontario Hydro case? It is my respectful position that this Board cannot allow the bargaining agents to void the rights of local contractors and local unions. The Board *must* protect those rights under Section 45 of the *Labour Relations Act*.

7. The facts in this case bring it squarely within the decision of the panel in the Beckett Elevator case referred to in the majority decision. It is wrong to assume that the panel in the Beckett case did not consider the definition of a "provincial agreement" in Section 139(e) [formerly Section 137(e)] of the Act. The theory behind Beckett Elevator is that the bargaining agencies were created under Section 145 [formerly Section 143] of the *Labour Relations Act* only for the purpose of conducting bargaining and concluding a provincial agreement. Their mandate does not include the right to deprive individual employers or locals of the right to arbitrate a dispute under the agreement.

8. Section 139(e) of the *Labour Relations Act* defines a provincial agreement it is not an empowering provision. Under Section 145 the Employer/Employee Bargaining Agents are empowered to conduct bargaining and conclude a provincial agreement - those are limited rights. Section 139(e) does not by itself empower or override the limited rights that flow to the bargaining agencies under Section 145(a) [formerly Section 143(a)].

9. What this decision stands for is the unchallengeable right of the Employer/Employee Bargaining Agencies to bargain into a collective agreement whatever they choose. Not only do they bargain what they want, the bargaining agencies also "arbitrate" any disputes under the collective agreement with their decision being final and binding on all the parties. This interpretation does not allow for any impartial appeal process for parties dissatisfied with the outcome of the Labour-Management Relations Committee of the Association and the Council "arbitration". Indeed this "Committee" takes over the role of the Labour Relations Board reducing the Boards role to that of a mere rubber stamp. Indeed that Joint Committee decision becomes an enforceable decision of the Supreme Court of Ontario even though the "parties" have not had the right to an "impartial" hearing as contemplated under Section 45 [formerly Section 44] of the *Labour Relations Act*.

10. decision leaves dissatisfied parties with only one avenue through which to pursue their complaints - Section 154 [formerly Section 151] of the *Labour Relations Act*. There is no sound labour relations purpose served by avoiding the arbitration process. As I have indicated earlier the majority interpretation can only lead to abuse and labour relations confusion.

11. For the above stated reasons, I would have dismissed the applicants preliminary motion and commenced hearing the grievance on its merits.

2273-91-R Reg Bell, Applicant v. Canadian Paperworkers Union Local 1199, Respondent v. Macmillan Bathurst Inc., Intervener

Termination - Timeliness - Board determining that under present wording of the Act and the Rules, an application for declaration terminating bargaining rights cannot validly be made or filed via facsimile transmission - Board ruling that application in this case made when six copies of completed Form 17 application delivered to Board by hand

BEFORE: Robert D. Howe, Vice-Chair, and Board Members W. H. Wightman and R. R. Montague.

APPEARANCES: C. J. Abbass and Reg Bell for the applicant; J. James Nyman and Andre Foucault for the respondent; Thomas A. Stefanik and Ronald Gruber for the intervener.

DECISION OF THE BOARD; January 22, 1992

1. Can an application for a declaration terminating bargaining rights validly be made to the Board by facsimile transmission ("fax")? That is the issue which has arisen for determination in these proceedings under section 58 (formerly section 57) of the *Labour Relations Act* (the "Act").

2. The most recent collective agreement between the respondent and the intervener

expired on June 30, 1991. On September 18, 1991 the applicant transmitted to the Board via fax machine a facsimile of a two-page document, the first page of which is headed as follows:

We, the undersigned, no longer wish to be represented by Canadian Paper Workers Union (CPU) as our bargaining [sic] agent for the Company MacMillan Bathurst (MBI) Guelph Ontario.

There are 68 signatures below that heading on the first page of the document, and 16 additional signatures on the top portion of the second page (which has no heading). The remainder of the second page reads as follows:

To the attention of the REGISTER! [sic]

PLEASE ACKNOWLEDGE RECEIPT OF THIS PETITION, BY FAX TO REG BELL,
LOCAL 1199, RECORDING-SECRETARY, CANADIAN PAPERWORKERS UNION,
A.S.A.P.

FAX #15198212978 THANK YOU IN ADVANCE
FOR YOUR CO-OPERATION
IN THIS MATTER,
(signed) "Reg Bell"

3. After they emerged from the Board's fax machine, each of those two faxed pages was time and date stamped by a member of the Board's staff as having been "received" at 5:45 p.m. on September 18, 1991. A member of the Board's staff also responded to the request contained on the second page by faxing to the applicant a "Facsimile Cover Page" containing the following "Special Instructions/Comments": "RECEIPT OF YOUR FAX IS ACK."

4. On or about September 23, 1991, a conciliation officer was appointed to confer with the respondent and the intervener, and endeavour to effect a collective agreement. During the course of his submissions concerning the fax issue, counsel for the applicant advised the Board that he wished to leave open the possibility of disputing the legality of that appointment, but did not intend to pursue the matter unless the Board ruled against him on the fax issue.

5. The aforementioned two-page facsimile was subsequently mailed to the applicant along with the other materials described in the following letter from a Board Solicitor:

Receipt is acknowledged of your petitions dated September 16, 1991 and received by the Board via Fax on September 18 requesting that the bargaining rights of the Canadian Paperworkers Union be terminated for the workers at MacMillan Bathurst Inc.

Enclosed is an application for declaration terminating bargaining rights. Failure to provide *all* of the information required in Form 17, fully and accurately, may result in delay or even the dismissal of an application. Applicants must ensure in particular that the following information is set out:

1. The timeliness, procedure and legal requirements in an application for termination of bargaining rights may vary, depending on whether it is filed under Section 57, 58, 59, 60 or 123 of the *Labour Relations Act*. Therefore, an applicant must *set out the section pursuant to which the application is being filed*, in the preamble of the Form 17.

2. An application must *set out in full in paragraph 3, the detailed description and geographic location of the unit to which the application relates*. This description is usually found in the recognition or scope clause of the most recent collective agreement in question. If a copy of such collective agreement is attached to the application, paragraph 3 may be left blank.

I am enclosing a copy of the Guide to the *Labour Relations Act*. You should read, in particular,

pages 56 to 59 before filling out the form. Persons are entitled but not required to be represented by a lawyer in proceedings before the Board; nevertheless, since an application may result in a hearing in which you will be required to call witnesses and give evidence, you might consider discussing the matter with a lawyer. If you do not have a lawyer, you may wish to contact a lawyer through the Law Society's Lawyer referral Service (416-947-3330). You may also qualify for legal aid if you fulfill the financial and other requirements of the Legal Aid Plan. Finally, you might consider seeking advice from a Community Legal Clinic. I have enclosed pamphlets describing all of these services for your information.

I am returning herewith the material which you have filed, together with two copies of Form 17, so that you may refile your application. Please note that one original and six photocopies of your application should be forwarded to the Board, attention to the Registrar.

6. On October 8, 1991, the original and five photocopies of a duly completed Form 17, Application for Declaration Terminating Bargaining Rights, were delivered to the Board by hand, along with the other material described in the following covering letter from counsel for the applicant:

Dear Ms. Innis:

Re: Termination Application
Reg Bell v Canadian Paperworkers Union
Local 1199 at MacMillan Bathurst Inc. Guelph Plant
Application filed September 18th, 1991

I act on behalf of Reg Bell and the group of employees at MacMillan Bathurst Inc., who have filed the above application to decertify Local 1199 as their exclusive bargaining agent.

Enclosed please find the original Petition, a copy of which was faxed to the Board on September 18th, 1991, along with the original application and five photo copies.

In setting a hearing date, please do not set it during the period from November 14th, to November 26th, 1991.

Thank you.

Yours very truly,

(signed) "C. J. Abbass"

CYRIL J. ABBASS

CJA/sa

P.S. I also enclose a copy of the Collective Agreement

7. In both his initial argument and his reply to Union counsel's submissions, counsel for the applicant contended that this application was made and filed on September 18, 1991. In support of that contention, he referred to the following sections of the Board's Rules of Procedure (the "Rules"):

1(1) In these Rules,

(a) "file" means file with the Board;

• • • •

15. An application for a declaration of termination of bargaining rights shall be made in quadruplicate in Form 17.

75(1) Where a document is required to be filed by these Rules, filing shall be deemed to be made,

- (a) at the time it is received by the Board; or
- (b) where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto, Ontario, M7A 1V4, at the time it is mailed.

(2) Where a document is required to be served by these Rules, the service may be made,

- (a) in person; or
- (b) by mail addressed to the recipient at his address for service or his last-known or usual address or at his principal office or his place of business, referred to in an application, complaint, intervention or reply in the proceeding.

Applicant's counsel also referred to section 84 of the Rules and section 116 (formerly section 114) of the Act, which provide that no proceedings are invalid by reason of any defect of form or technical irregularity, and to the following notice that was published by the Board in February of 1990:

NOTICE

Facsimile Transmissions

The Board now has a facsimile machine in operation which can be reached at 416-326-7531.

Persons may send to the Board via facsimile documents which are short and of an urgent nature, are not required under the Rules to be filed, *and* concern only arrangements for dates for meetings, examinations and hearings.

Every transmission should include a covering page indicating:

- (a) the sender's name, address and telephone number;
- (b) the date and time of transmission;
- (c) the total number of pages transmitted, including the cover page;
- (d) the telephone number from which the document is transmitted; and
- (e) the name and telephone number of a person to contact in the event of transmission problems.

It would be appreciated if senders would *not* send a follow-up copy or telephone the Board to confirm receipt unless absolutely necessary.

The applicant's position concerning that notice was that it was not sufficient to constitute a procedural requirement that could allow an otherwise timely application to be defeated. Counsel for the intervener adopted a similar position concerning that notice and other matters raised by applicant's counsel. In addition, he contended that the Rules provide for applications to be made "in quadruplicate", do not refer to an original and three copies, and thus permit an applicant to make an application by filing photocopies, including faxes, which he characterized as merely one form of photocopy.

8. Counsel for the respondent conceded that, but for its having been faxed to the Board, the aforementioned two-page document could properly be treated as being, in substance, an appli-

cation for termination of bargaining rights. However, he submitted that neither the Act nor the Rules contemplate the making of an application by fax. He further submitted that it is precluded by the Board's policy regarding facsimile transmissions (as quoted above), and that an original must be filed to avoid authenticity problems. It was also his contention that accepting the filing of applications and complaints by fax would involve many problems, including determining when they were filed (at the time of transmittal, at the time of entry into the memory of the receiving fax machine, or at the time of printing by the receiving fax machine?), dealing with the transient nature of faxes (which may fade or disappear over time), dealing with interrupted or incomplete reception, and dealing with problems associated with the requirement that multiple copies be filed with the Board.

9. Counsel also referred the Board to some previous decisions, including court cases involving facsimile transmissions. However, the Board has not found any of them to be of assistance in deciding this case, as they each arose in a factual or statutory context bearing no useful similarity to the instant case.

10. Having carefully considered all of the parties' submissions (the most significant of which are summarized above), the Board has concluded, for the reasons set forth below, that under the present wording of the Act and the Board's Rules of Procedure, an application for a declaration terminating bargaining rights cannot validly be made to the Board by facsimile transmission.

11. Under section 58(2) of the Act, any of the employees in the bargaining unit defined in a collective agreement may, subject to section 62 (formerly section 61), apply to the Board during the applicable time frame (generally referred to in the labour relations community as the "open period") specified in that subsection. In the instant case, the open period commenced on May 1, 1991. Although there appears to be a dispute among the parties regarding whether in the circumstances of this case section 62 renders untimely a termination application made on October 8, 1991, it is not disputed that a termination application made on September 18, 1991 would be timely.

12. As indicated above, section 15 of the Rules ("Rule 15") provides that an application for declaration of termination of bargaining rights "shall be made in quadruplicate in Form 17". Although Rule 15 does not specify the manner in which such application is to be made, it is apparent from a reading of the Act and the Rules in their entirety that such application is to be made by filing Form 17 (or its substantial equivalent) with the Board in quadruplicate. Under section 115(2) (formerly section 113(2)) of the Act, such application may be made by sending it to the Board by registered mail. That provision reads as follows:

An application for certification or accreditation or for a declaration that a trade union or employer's organization no longer represents the employees or employers, as the case may be, in a bargaining unit, if sent by registered mail addressed to the Board at Toronto, shall be deemed to have been made on the date on which it was so mailed.

13. That statutory provision is paralleled by Rule 75(1) which, as noted above, provides:

Where a document is required to be filed by these Rules, filing shall be deemed to be made,

- (a) at the time it is received by the Board; or
- (b) where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto, Ontario, M7A 1V4, at the time it is mailed.

Thus, in addition to delivery by hand, which is the method by which documents have traditionally

been filed with a court or tribunal, the Act and the Rules permit filing by registered mail. However, nothing in the Act or the Rules permits an application to be made or filed via fax.

14. A rule identical to what is now Rule 75 has been in force since at least October 12, 1960 (see section 52 of O. Reg. 268/60). Thus, filing via telephone facsimile transmission could not have been contemplated at the time that Rule 75 was drafted and brought into force, as that technology was not in existence at that time. Moreover, we are not persuaded that the emergence from the Board's fax machine of a facsimile of an application transmitted to the Board by telephone transmission amounts to the application having been "received by the Board", within the meaning of Rule 75(1)(a), or "made" by the applicant, within the meaning of Rule 15. An example of the wording of a rule which does contemplate the use of such technology is provided by Rule 16.05 of the (Ontario) Rules of Civil Procedure, which provides, in part, as follows:

16.05(1) Service of a document on the solicitor of record of a party may be made,

• • •

(d) by telephone transmission of a facsimile of the document in accordance with subrule (3).

• • •

(3) A document that is served by telephone transmission shall include a cover page indicating,

- (a) the sender's name, address and telephone number;
- (b) the name of the solicitor to be served;
- (c) the date and time of transmission;
- (d) the total number of pages transmitted, including the cover page;
- (e) the telephone number from which the document is transmitted; and
- (f) the name and telephone number of a person to contact in the event of transmission problems.

However, as is the case under the Board's Rules of Procedure, documents by which proceedings are initiated cannot be filed with the court office via facsimile transmission (see Rule 4.05(1) and (4)).

15. As indicated in the Board's above-quoted notice regarding facsimile transmissions, the Board has a fax machine in operation through which persons may send to the Board, via facsimile transmission, short documents of an urgent nature that are not required by the Rules to be filed, and that concern arrangements for dates for meetings, examinations, and hearings. However, under the Act in its present form and the Board's existing Rules, persons are not permitted to make or file applications with the Board by fax. If that is to be changed, thereby significantly altering in actual practical impact the existing scheme, it will require an amendment to the Rules or the Act. Moreover, we are not satisfied that the applicant's use of telephone facsimile transmission constituted a mere defect in form or technical irregularity cured by section 116 of the Act or Rule 84. To the contrary, we are of the view that it constituted a substantial failure to comply with the requirements of section 58 of the Act and Rule 15.

16. The Board is not insensitive to the fact that this decision may have the effect of postponing, for a limited period, a determination of whether or not the applicant and other employees in the bargaining unit no longer wish to be represented by the respondent. However, the appli-

cant's lack of awareness of the law does not excuse his failure to comply with it. Moreover, he could easily have ascertained that applications cannot be filed with the Board via facsimile transmission by merely contacting the Registrar's office and asking about that matter. Although neither the Registrar nor any other Board official is permitted to provide legal advice to prospective applicants or other individuals, they can and do provide them with materials such as Forms, Board Notices, the Rules, and the Guide to the Act, and with information of the type contained in the Board Solicitor's letter quoted in paragraph 5 of this decision.

17. For the foregoing reasons, the Board has concluded that under the present wording of the Act and the Rules, an application for a declaration terminating bargaining rights cannot validly be made or filed via facsimile transmission. Thus, the instant application was not made or filed on September 18, 1991, but rather was made or filed on October 8, 1991, when the original and five photocopies of a duly completed Form 17 application were delivered to the Board by hand.

18. As indicated above, applicant's counsel indicated that he might wish to dispute the legality of the conciliation officer's appointment. If applicant's counsel intends to pursue that matter, he must so advise the Registrar in writing, along with all his submissions in support of his client's position concerning that matter, within fourteen days of the date of this decision. Otherwise, this application will be dismissed by the Board forthwith on the grounds that section 62 of the Act renders it untimely.

1586-90-G; 1587-90-G; 1887-90-U Ontario Allied Construction Trades Council; Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, Applicants v. Electrical Power Systems Construction Association; **Ontario Hydro**, Respondents v. Labourers' International Union of North America, Local 1059, Ontario Provincial District Council and its affiliated local unions, Intervener; Ontario Allied Construction Trades Council; Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, Applicants v. Electrical Power Systems Construction Association; Ontario Hydro, Respondents v. Labourers' International Union of North America, Local 1059, Ontario Provincial District Council and its affiliated local unions, Intervener; Ontario Allied Construction Trades Council; Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, Complainants v. Electrical Power Systems Construction Association; Ontario Hydro, Respondents v. Labourers' International Union of North America, Local 1059, Ontario Provincial District Council and its affiliated local unions, Intervener

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Practice and Procedure - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute com-

plaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers' strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *N. L. Jesin* and *L. Balanzin* for the applicants; *John C. Field* and *Peter Watson* for the respondents; *L. A. Richmond* and *J. MacKinnon* for the intervener.

DECISION OF THE BOARD; January 23, 1992

1. These matters are a complaint of unfair labour practice, in which the complainants allege that the respondents have violated sections 65 and 67(a) and (c) [formerly sections 64 and 66(a) and (c)] of the *Labour Relations Act* ("the Act"), and two referrals of grievances to arbitration pursuant to the provisions of section 126 [formerly section 124] of the Act. The respondents, Electrical Power Systems Construction Association ("EPSCA") and Ontario Hydro ("Hydro") and the intervener, Labourers' International Union of North America Ontario Provincial District Council and its affiliated local unions ("the Labourers") argue that the matters ought to be dismissed or deferred on the basis that the complaint and grievances either do not establish a *prima facie* case, or constitute work assignment disputes which are more appropriately litigated in another forum.

2. The complainant union submits that the Labourers do not have standing in these matters. These issues were raised before the Board as preliminary issues on which we heard argument, and reserved our rulings. The Ontario Allied Construction Trades Council was represented at the hearing by counsel but takes no position on the preliminary issues.

Complaint Under Section 91 [formerly section 89]

3. It is necessary to set out the particulars of the complaint and grievances in some detail. In late 1989, the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 ("Local 598" or the "Cement Masons") filed a grievance with respect to an assignment of work by Hydro at the Longwood Generating Station. The work involved dry packing, which was assigned to members of the Labourers. A jurisdictional dispute was processed in accordance with the Plan for Settlement of Jurisdictional Disputes in Washington ("the Plan"), resulting in an agreement between the Labourers' International Union ("the Labourers International") and Local 598 specifying, among other things, that dry packing is the work of the Cement Masons. It is alleged that at the time of this agreement, the parties also agreed that no grouting would be performed on the same job.

4. Local 598 alleges that subsequent to this, a representative of EPSCA made statements to the effect that no Cement Masons should be employed on Hydro lines and stations projects, and that in the event the Cement Masons won jurisdiction over particular work, he would attempt to arrange for another form of work to be used instead or to persuade his superiors that the work was not required. The complaint alleges that, in response to the agreement under the Plan, the respondents decided to change the material to be used on the Longwood project from dry pack to grout, and assigned the grouting work to the Labourers.

5. The complaint also states that other work has been performed by Hydro at the J. Clark Keith Generating Station contrary to the above agreement on dry-packing, and that the failure of

Hydro to hold a mark-up meeting in respect of this work is related to its failure to recognize Local 598.

6. In early 1990, Local 598 initiated a further jurisdictional dispute in accordance with the Plan, over the assignment of screeding and finishing to the Labourers at the Pickering Generating Station. This also resulted in an agreement between the Labourers International and Local 598, in which the parties agreed that screeding, straight edging, floating and finishing was the work of Cement Masons. It is alleged that in response to this agreement, the respondents re-assigned the screeding and finishing at Pickering to Cement Masons, but re-assigned other work involving the cutting of concrete joints to the Labourers.

7. The complaint also states that the respondents assigned further screeding, floating and finishing work at Saunders Generating Station to the Labourers, although the Labourers were not present at the mark-up meeting.

8. The complainants state that by their actions, the respondents have interfered with the administration of a trade union and with the representation of employees by a trade union, have refused to employ members of Local 598 and have discriminated against them in regard to employment because they are members of Local 598, and have sought to compel employees to refrain from becoming or from continuing to be members of Local 598, all of which is in violation of sections 65, 67(a) and 67(b) of the Act. The complainants request that the Board declare that the respondents have violated sections 65 and 67 of the Act, order the respondents to cease and desist from violating the Act as aforesaid, order the respondents to post notices detailing their violations of the Act, order damages flowing from the respondents' breaches of the Act, and order such further and other relief as may be appropriate.

Referrals of Grievances

9. The grievance in Board File No. 1586-90-G ("the mark-up grievance") alleges that Ontario Hydro has violated the collective agreement between EPSCA and the Ontario Allied Construction Trades Council by failing to hold a mark-up meeting with respect to work at the J. Clark Keith Generating Station. The relief requested is a re-assignment of such work, and damages to Local 598 on behalf of its members.

10. The grievance in Board File No. 1587-90-G ("the work assignment grievance") alleges that Ontario Hydro has violated the agreement by changing the work assignment with respect to the cutting of concrete joints at the Pickering Generating Station and requests as relief the assignment of this work to members of Local 598.

11. The work assignment grievance was filed on June 21, 1990 and the mark-up grievance on August 20, 1990. Both were referred to the Board on September 18, 1990. The complaint under section 91 was filed on October 19, 1990.

Positions of the Parties

12. As stated above, Local 598 objects to the Labourers having status in these proceedings. Early in the day, Local 598 raised a question as to the standing of the Labourers to even participate in the argument regarding a *prima facie* case, given that its standing had not been determined. The Labourers clarified that to the extent that it takes the position that the complaint should be dismissed as disclosing no *prima facie* case, its argument is that the complaint is essentially a work jurisdiction complaint which ought to be litigated in a different forum. On this basis, the Board ruled orally that it was prepared to grant limited status to the Labourers, to present argument on

the issue of whether we should hear the complaint and grievances, or defer or dismiss them on the basis that they constitute jurisdiction disputes. We reserved on the question of the Labourers' standing on the merits, should the matters proceed.

13. On the issue of the *prima facie* case, EPSCA and Hydro argue that all three matters before the Board are at root and in substance jurisdiction disputes. The complaint relates to a contention that the Labourers are being assigned work which Local 598 asserts is Cement Mason work. Both grievances ask as relief that certain work be assigned to members of Local 598. Counsel for EPSCA and Hydro referred to numerous documents relating to proceedings at the Plan. These documents were submitted to the Board by the Labourers, on agreement of EPSCA and Hydro. Counsel for Local 598 did not object to the introduction of the documents; however, he urged the Board, for the purposes of the decision regarding the *prima facie* case, to give primacy to the facts as pleaded in the complaint in the event of any inconsistency between the documents and the pleadings.

14. Counsel for EPSCA and Hydro argues that the documents show that the dispute between the parties is essentially a dispute over work assignment. In his submission, the differences between the parties over work jurisdiction have not been determined or resolved and Local 598 is seeking to have the Board deal with these differences under the guise of a complaint under section 91 and grievances. Among other things, the documents show that Local 598, through its international union, has initiated proceedings before the Plan disputing the assignment of the grouting work at Longwood Generating Station to the Labourers. This proceeding has been adjourned at the request of the Cement Masons.

15. Counsel referred us to the following cases: *Toronto Star Newspaper Limited*, [1979] OLRB Rep. May 451; *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022; *Ontario Hydro*, [1985] OLRB Rep. Feb. 307; *Labourer's International Union of North America, Local 183 v. International Union of Operating Engineers, Local 793* Board File Nos. 3097-89-U and 3163-89-U, November 8, 1990, unreported; *Ontario Hydro*, Board File Nos. 2793-83-M and 2794-83-M, March 27, 1984, unreported; *Pre-Con Company, a Division of St. Marys Cement Limited*, [1981] OLRB Rep. July 947; *Napev Construction Limited*, [1982] OLRB Rep. Jan. 79; *Napev Construction Limited*, [1979] OLRB Rep. Sept. 886; *Silverwood Dairies Limited*, [1981] OLRB Rep. Nov. 1624; *Beer Precast Concrete Limited*, [1968] OLRB Rep. Sept. 619; *Gambin Brothers Limited*, [1968] OLRB Rep. Aug. 494; *Petro-Canada Products and Energy and Chemical Workers Union, Local 593*, unreported decision of Arbitrator Paula Knopf dated January 24, 1990.

16. Counsel for the Labourers submitted that the law before the Board is that where the facts giving rise to a proceeding are essentially a dispute over the assignment of work or work jurisdiction, the Board will require the parties to have that issue determined by the tribunal provided for in a collective agreement, or under section 93 [formerly section 91] of the Act. The Board has not allowed a complainant to come to the Board under other provisions of the Act in such a case, even if those other provisions are arguably applicable. In *Beer Precast Concrete Limited*, *supra*, for example, the allegation was that the employer had wrongfully terminated the employment of a member of a trade union, thus committing an unfair labour practice. The Board found that as the real problem in the complaint was a jurisdiction or work assignment dispute, any remedy against the respondents was by way of a work assignment complaint under the Act.

17. In *Toronto Stars Newspapers Limited*, *supra*, the Board found that a bad faith bargaining complaint was really a dispute over work jurisdiction which ought to be resolved through the work assignment complaint provisions under the Act. In *Silverwood Dairies Limited*, *supra*, the

Board “converted” a complaint under section 91 of the Act alleging violations of sections 3, 65, 67 and 68(1) [formerly section 67(1)] into a proceeding under section 93 where the complaint contained all the elements of a jurisdictional dispute, and all necessary parties were present at the proceeding. In *Ontario Hydro* (1985), *supra*, the Board found no *prima facie* case in a complaint of violations of sections 49, 50, 65, 67, 68 and 71 [formerly sections 48, 49, 64, 66, 67 and 70] of the Act where in its view, the dispute was about the overlap in work jurisdiction between two unions and not with respect to bargaining rights.

18. Counsel submitted that even if all a union seeks is to have the Board apply and enforce a decision of record, the Board has deferred to jurisdictional dispute resolution procedures. In *Ontario Hydro* (1984), *supra*, the collective agreement specified that the work jurisdiction of the union would be that established by, among other things, “decisions of record”. The grievance filed alleged that Ontario Hydro violated the agreement by failing to make an assignment of work in accordance with a 1926 decision of record. The Board declined to hear the grievance, stating that it would not permit a union to use section 126 proceedings to obtain, in the context of a grievance with clear jurisdictional overtones, an interpretation by the Board of a decision of record with a view to binding the employer to that interpretation in all future work assignments.

19. In the present case, counsel submits, even if the facts pleaded in the section 91 complaint are true, the complainant ought to enforce its work jurisdiction by bringing a complaint under section 93, in which decisions of record or settlements between the parties will be taken into account by the Board in determining the appropriateness of an assignment. The Labourers ask that we terminate or defer the present proceedings without prejudice to the right of Local 598 to bring a complaint to the Board under section 93 or pursue the matter under the Plan.

20. Local 598, on the other hand, submits that although there have been issues of work jurisdiction between the parties, in fact these issues have been determined. The issue which Local 598 now wishes to place before the Board is to what extent these determinations can be enforced. Counsel states that from 1989 forward, when issues of work jurisdiction arose, Local 598 followed the procedures available to it for determination of these issues. Each time Local 598 gained a determination which was favourable to it, EPSCA and Ontario Hydro have tried to circumvent these decisions, by changing the work method, by taking away other work from the Cement Masons, or by simply ignoring the decisions.

21. In the submissions of counsel, Local 598 is not seeking to litigate issues of work jurisdiction. To the extent that such issues have already been determined in another forum, they are simply attempting to have the respondents abide by the decisions. Counsel states that if the Board decides ultimately that the issues of work assignment have not in fact been resolved, then the complaint will not have been made out. In any event, this Board need not decide any issues of work jurisdiction in order to hear the section 91 complaint. To the extent that there may still be issues of work jurisdiction outstanding, it is submitted that these are not relevant to the section 91 complaint. For instance, Local 598 does not dispute that there may be an outstanding dispute with respect to the work jurisdiction over grouting at the Longwood site, which has been referred to the Plan. However, counsel submits that the appropriateness of that assignment of work is not the issue under the section 91 complaint. Rather, the issue under the section 91 complaint is that the work method was specifically changed from dry packing to grouting in order to avoid a decision under the Plan. If the complaint is upheld, then regardless of the proper work jurisdiction, Local 598 has a claim to damages based on a violation of the Act.

22. At the conclusion of the day’s argument, counsel for Local 598 sought the Board’s leave to amend the complaint under section 91 to add section 93(14) of the Act. This section reads:

93.(14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and the trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of the tribunal.

The Board requested written submissions from the parties in view of the hour. By letters dated November 5 and 22, 1991, counsel for Local 598 repeated the request, stating that it is not seeking by this amendment to add any particulars or change the substance of its complaint. Rather, Local 598 will rely on the particulars as already set out in the complaint, to support an allegation that EPSCA and Hydro have also violated section 93(14). Counsel states that there is no prejudice to the amendment so long as the opposing parties have an opportunity to respond.

23. EPSCA and Hydro respond that Local 598 ought not to be permitted to amend its complaint at this stage of the proceedings. They submit that a complaint under section 93(14) raises an entirely different complaint, and as such should be the subject of a separate application. Counsel states that parties have fully argued preliminary objections with respect to the existing complaint and there is thus no issue of an opportunity to respond to the amendment. The Labourers, likewise, object to the amendment. Counsel states that the Labourers' position on the preliminary matter and its conduct at the hearing on November 1, 1991 were based on the complaint as filed in October of 1990. He argues that the request to rely on section 93(14) of the Act creates an entirely different complaint than the one alleged. Counsel also states:

We have argued that the complaint is essentially jurisdictional in nature and ought to be dealt with as a jurisdictional dispute. The complainant's request to rely on 91(14) [now 93(14)] demonstrates beyond question that our preliminary objection is valid, and the particulars relied on in the complaint constitute a jurisdictional dispute which ought to be dealt with under section 93 of the Act or the collective agreement. If the Complainant had originally relied on section 93(14) of the Act, the argument, the admission of evidence, and the reply of the Intervener would have been completely different. It would not have been necessary to spend the entire day arguing whether the matters were essentially jurisdictional in matter since reliance on Section 93(14) would have been ample proof of the fact. Accordingly, the entire subject matter of the hearing would have been different, and the agreement with respect to evidence would have been different to correspond with the different argument. The effect of allowing the amendment at this stage of the proceedings is to create an entirely new case to the prejudice of our client.

There is no reason for the Complainant to wait until the last minute of the hearing to amend a complaint filed more than a year earlier, and after all pre-hearing matters had been addressed. The effect of allowing the Complainant to amend the complaint at this stage, is to turn the entire hearing of November 1st into an academic exercise. If we are now required to meet an entirely new complaint which contains an allegation respecting Section 93(14), then we would require that the entire hearing commence *de novo* and the complainant be required to pay all of our client's considerable costs to date.

It is our position that to allow the amendment is to prejudice our client and to essentially change the ground rules under which the hearing of November 1st was conducted. Accordingly, we request the Board to exercise its discretion and decline to allow the Complainant to amend its complaint at this date. In the alternative, if the Board does decide to allow the Complainant to amend, we request that the Board schedule new hearings *de novo* and destroy all notes and exhibits filed to date, and order the Complainant to pay all costs of the Intervener to date.

Decision of the Board: I - The Complaint Under Section 91

24. In addition to the cases cited by counsel, this Board has dealt with similar issues on many occasions. Recently, the Board reviewed some of its jurisprudence in this area in *Peter*

Kiewit Sons Co. Ltd., [1991] OLRB Rep. July 881. That case involved an application for certification by the Labourers' International Union of North America, Local 837 ("Local 837"), who were seeking to displace the bargaining rights of the United Brotherhood of Carpenters and Joiners of America, Local 38 ("Local 38"), and a complaint of unfair labour practice by Local 38 against Local 837 and the employer. The application for certification was made in the context of unsuccessful attempts by Local 38 to secure a first collective agreement. The complaint alleged that the employer and Local 837 were conspiring to undermine the bargaining rights of Local 38.

25. The Board dismissed the section 91 complaint as disclosing no *prima facie* case. The Board stated:

4. ...

The key point as the Board continues to see it is that at root in the complaint is the employer's assignment of work, and if the employer has indeed changed its own practice with respect to the manner in which it chooses to get certain work done, that obviously is a factor that the dispossessed Union is able to rely upon in any jurisdictional claim to be determined by the Board. But beyond that, an employer "preference" of one union over another is exactly what jurisdictional-dispute proceedings tend to be all about, and there is nothing unusual in an employer putting forward considerations of economy, efficiency, or any other grounds of such nature, for however far such factors on a given set of facts may ultimately take the employer. Similarly, the Board has never suggested that a trade union commits an unfair labour practice by seeking the inclusion of terms in its *own* collective agreement designed to enhance its position from a "jurisdictional" point of view, and that is hardly something new to the construction industry, as the Carpenters' well know.

26. However, the Board also recognized that there might be circumstances in which a work jurisdiction dispute becomes intertwined with the future of a union's bargaining unit, and where the Board will exercise its jurisdiction to remedy an unfair labour practice:

5. On the other hand, positions taken by an employer in the bargaining between itself and the *complaining* Union may well be considered by the Board to fall within its scope of review under section 15 of the Act, which enshrines the duty to bargain in good faith. Certainly the Board would have concern over the refusal of an employer in *Kiewit's* position to bargain towards a collective agreement at all - for example, on the grounds that it at the time employed no employees which fell within the scope of the union's bargaining rights, and did not foresee a change in that. But on the pleaded facts and documents, that is not, at least by the time counsel were involved, what happened here, and the Carpenters' Union brought no complaint under section 15 of the Act alleging that it did. Beyond that stark example, however, the Board as a practical matter has also recognized, particularly in dealing with "craft" unions, the area of overlap between work jurisdiction and the future of a union's bargaining unit, and the Board has responded to its role under section 15 of the Act to prevent an employer from pressing to impasse a demand which would be tantamount to asking a union to "shoot itself in the foot" with respect to its chances subsequently of being able to successfully mount or defend any jurisdictional claim to the work.
6. That is what the "second" *Toronto Star Newspapers Limited* case, relied upon by the Carpenters' and reported at [1979] OLRB Rep. August 811, decides - and that is all that that case decides. In that case, the Board had already dismissed a previous "unfair labour practice" complaint on the grounds quoted above.
7. On the section 15 aspect of the complaint, however, the Board in this second decision noted as well from the earlier decision:

5.

In dismissing the complaint on the basis set out above the Board was careful to point out in the final paragraph of its decision that its conclusion did not mean that the Star and the stereotypers could use the negotiation process to weaken the photoengravers' claim to the work in question. The Board stated unequivocally at paragraph 16 that:

"Local 35-P (photoengravers) is entitled under section 81 of the Act to have its claim to the work in question dealt with on its merits. Accordingly, any attempt to circumvent the jurisdictional dispute procedures of the Act by either the Star or Local 1 in their bargaining would be inconsistent with the Act and would amount to a breach of the duty to bargain in good faith."

Focusing then on the bargaining between the employer and the *complainant* Union, the Board went on to conclude as follows:

18. The fact situation before this Board is substantially different than that upon which the Board dismissed the earlier section 14 [now 15] complaint. Since the issuance of the Board's earlier decision the Star has amended its position so that it no longer seeks a discretion in respect of work assignment but rather is attempting to alter the work description in the collective agreement. All other matters have been tentatively settled so that work jurisdiction remains as the only matter in dispute and the Minister has issued a "no board" report so that the parties are currently in a legal strike/lockout position. In addition the Star has negotiated a tentative settlement with the stereotypers which includes a work description which overlaps with that found in the expired photoengravers' collective agreement. It is against these critical facts that this panel must decide if either or both of the respondents have violated section 14 of the Act.

19. Both respondents rely in large measure on the legality of the work assignment agreements previously negotiated by the parties and argue that if such agreements are legal within the framework of the Act it cannot be illegal to bargain for them. This argument is sound in so far as it goes. The respondents, however, ignore the fact that the negotiations between the Star and the photoengravers have reached an impasse over this very issue and that a strike or lockout is now imminent. Clearly there is nothing unlawful about attempting to work out an agreement between interested parties and indeed, such agreements are contemplated under the Act and the parties are to be encouraged in this regard. In this round, however, in contrast to the last round of negotiations, the Star and the photoengravers have not been able to reach a voluntary agreement. It is clear that if the work description is to be altered it will be as a result of economic leverage. The Board must assess the bargaining between the parties in light of this fact and in light of the provisions of section 81 of the Act.

...

22. In view of the express provisions in section 81, respecting the resolution of jurisdictional disputes, are the parties free to resort to economic conflict to settle these matters, and can a party be bargaining in good faith if it presses the issue to an impasse and precipitates a strike? The answer must be no. It is inconceivable that the Act would contemplate resort to strike or lockout in support of a work assignment objective which could properly be made the subject matter of a section 81 complaint upon the actual assignment of the work. If such were the case the strike/lockout would be a tenuous and perhaps fruitless exercise in that the Board, on any subsequent application under the section, would be required to assess the merits and could decide the matter independently of the results achieved by use of what might have

been a prolonged and costly economic struggle. The work assignment agreement thus achieved, in contrast to the other terms of settlement, would be subject to review and possible alteration by the Board. Under the section the Board may make its determination notwithstanding the work assignment provisions of any collective agreement and, in appropriate circumstances, can even “rewrite” those provisions. In a general sense then it can be seen that bargaining issues relating to work jurisdiction which could be made the subject of a section 81 application do not easily fit within the process of free collective bargaining and enforceability as established under the Act. More specifically, the broad interim powers given the Board under section 81(8) to deal with work jurisdiction complaints where a strike is imminent underscores the qualitative difference between work jurisdiction and the usual subject matters giving rise to strike or lockout. If a strike is imminent because of a bargaining demand for a work assignment involving work being done by another union it can be met with a section 81(8) complaint and in response the Board may issue an interim order which removes the work jurisdiction issue from the realm of bipartite economic struggle and paves the way for a hearing on the merits involving all interested parties. On its face then section 81 qualifies the union’s right to strike and prevents the development of a situation in which the assignment of work will be determined by the relative economic strength of either of the competing unions or the employer.

...

24. In this case it is the Star which is attempting to force acceptance of an arrangement other than the status quo as embodied in the previous collective agreement and in so doing is *requiring the photoengravers to possibly prejudice their position in any subsequent section 81 proceedings*. Indeed, the Star maintains in its representations that if an agreement is achieved through the use of free collective bargaining a potential jurisdictional dispute will be effectively disposed of. In its earlier decision the Board stated that neither the Star nor Local 1 (stereotypers) could use the negotiation process to weaken the photoengravers’ claim to the work in question. The Star, however, has ignored the caution contained in the Board’s earlier decision and has misused the bargaining process by pursuing its demand to a bargaining impasse. The photoengravers have refused to voluntarily alter the existing agreement and accordingly, the Board hereby finds, in the face of a bargaining impasse, that the refusal of the Star to withdraw its demand without prejudice to whatever position it might take in any subsequent section 81 complaint, constitutes a violation of the duty contained in section 14 [now section 15] of the Act.

...

[emphasis added]

27. As stated above, in *Peter Kiewit*, the Board dismissed the section 91 complaint. No complaint under section 15 of the Act and no application for a first contract had been made by Local 38.

28. In most cases where this Board has deferred proceedings under other sections of the Act to the provisions of section 93, it has been because the essence of the issue was found to be a complaint that an employer had assigned work to the members of one union, in preference to the members of another. Work assignment complaints and complaints about bargaining rights are not, of course, discrete packages, and even where a section 91 complaint contains elements of both, the Board has deferred to section 93. However, as outlined in *Peter Kiewit* and illustrated by the “second” *Toronto Star Newspapers Limited* case, there will also be other circumstances where this Board will exercise its discretion to hear the complaint under section 91 in order to protect rights

under the Act. Which approach is taken in each case depends on the extent to which the issues raised extend beyond work assignment complaints and clearly bring into play other policies and rights under the Act.

29. In our view, the facts of the present case are distinguishable from the cases in which this Board has chosen to defer a section 91 complaint to section 93 of the Act. What is asserted here is that the parties have been involved in work assignment disputes, and have followed the mechanism provided for under the collective agreement for resolution of these disputes. Local 598 alleges that following such resolution, EPSCA and Hydro have refused to comply with the results. Local 598 alleges that the respondents have employed various unlawful means to avoid following the determinations on work jurisdiction.

30. The course of dealing outlined in the complaint distinguishes this case from the ones cited above in which the complaining union is unhappy about a specific work assignment or, as in *Ontario Hydro* (1985), *supra*, a specific statement by the employer as to a future intended assignment. In those cases, the complaining union had the option of challenging the work assignment through the procedures available to it for resolving work disputes. Likewise, in *Ontario Hydro* (1984), *supra*, the employer's alleged failure to comply with a Decision of Record could be challenged through the mechanism for resolving work assignment disputes. In none of those cases was the basis of the complaint an allegation that the employer repeatedly refused to apply a determination of work jurisdiction to the very work which was in dispute under the determination. Further, none of these previous cases involve allegations that an employer changed the method of work, or re-assigned other work, in order to undercut a determination of work jurisdiction.

31. The result is that, in our view, the determination of the merits of this complaint does not require the Board to engage in a determination of work jurisdiction. To the extent that Local 598 complains that the Labourers are employed in grouting work for the employer, the basis of the complaint is not that the work ought to have been assigned to Local 598, but that the employer changed the method of work to avoid assigning dry-pack to the Cement Masons. In fact, Local 598 *does* take issue with the assignment of grouting to the Labourers; however, as all parties indicated, this dispute is before the Plan for resolution. The success of the complaint under section 91 does not depend on a resolution of this dispute in favour of Local 598. To the extent that the complaint is about concrete cutting, the allegation is that the employer re-assigned this work to the Labourers after it was forced to assign other work to the Cement Masons under a decision of the Plan. In this as well, the merits of the complaint do not raise the issue of the *appropriateness* of the assignment to the Labourers, but only the motivation behind it.

32. Assuming the pleadings to be true, it seems to us that there is good reason for the Board to inquire into the complaint. If, as alleged, the respondents refuse to recognize determinations under the Plan with respect to work jurisdiction, and seek to find ways to avoid them, it is plausible to us that the real issue may not be work jurisdiction, but the rights of Local 598 under the Act. If so, it would be reasonable to expect that a complaint under section 93 or under the dispute resolution mechanisms of the collective agreement will not deal adequately with this issue. A work assignment proceeding could result in a resolution of appropriate work assignment without ever addressing the issues raised by Local 598 in the complaint under section 91. For instance, grouting work may well be labourers' work. In a jurisdiction dispute, Local 598 will not be able to litigate its allegation that but for the respondents' unlawful conduct, no grouting work would have been done.

33. We do not doubt that there is potential for some overlap between the matters raised in the section 91 complaint, and a work jurisdiction complaint. For instance, this Board may have to

determine the scope of the Plan's decisions on the work which was in dispute to determine whether, as is alleged, there has been a failure to comply with them. Thus, in the course of adjudicating the complaint, the Board may have to interpret the decisions, and inquire into the nature of the work done by the employer subsequent to the decisions. There is, however, a significant difference between interpreting and applying a determination to what is alleged to be the very work which was the subject of the determination, and engaging in the much broader inquiry under a section 93 complaint. Where it is asserted that the parties in fact have sought and obtained a determination of a work jurisdiction dispute, it is unclear what policy reason exists to having them go through the same exercise again, either under section 93 or the Plan.

34. We therefore dismiss the preliminary motion regarding the section 91 complaint.

II - The Grievances

35. As outlined above, the two grievances which have been referred to the Board for arbitration relate to an alleged failure to hold a mark-up meeting at the J. Clark Keith Generating Station, and an alleged change of work assignment involving the cutting of concrete joints. The remedy requested under both grievances is a re-assignment of the work to members of Local 598. Additionally, the mark-up grievance requests damages on behalf of Local 598 members.

36. The events which are the subject of these grievances also form part of the section 91 complaint. In the complaint, Local 598 alleges that the failure to hold a mark-up meeting, in contravention of the collective agreement, is related to the failure by the respondents to recognize Local 598. The complaint also alleges that the re-assignment of the cutting of concrete joints to the Labourers was the respondents' response to a work jurisdiction determination which gave other work to Cement Masons.

37. EPSCA, Hydro and the Labourers submit that the grievances ought to be dismissed or deferred by the Board, since they are in substance work assignment disputes. They emphasize that the remedy requested in both grievances is the re-assignment of work.

38. The Board dealt with similar circumstances in *Schindler Elevator Corporation* [1990] OLRB Rep. Oct. 1092, a case involving the same collective agreement as the one before us, and to which EPSCA and Hydro were also party. In that case, the grievance was based on an alleged failure to hold a mark-up meeting. The remedy requested by the union was compensation for the loss. The intervener, International Union of Elevator Constructors, Local 50, EPSCA and Hydro argued that the Board ought to defer the hearing on the grievance, pending a resolution of a jurisdiction dispute proceeding under section 93 of the Act. The Board agreed that the grievance raised an issue of work jurisdiction, stating:

18. ... We are satisfied that because the applicant and the grievance before us must establish a right to the work in question and a reasonable probability that it would have been awarded that work before it can obtain the damages it seeks, matters in issue in the grievance go beyond questions of collective agreement interpretation and have a substantial and proximate jurisdictional element and implications. A grievance which raises an issue of work assignment, even if only at the remedy stage, brings a dispute within the ambit of section 91 [now 93] of the Act.

39. The Board then stated:

19. However, that substantial jurisdictional aspect does not arise, for practical purposes, unless and until the applicant has established that the respondents, or any of them, have breached the EPSCA agreement. It is unable to establish such a breach or, in the alternative, if it is unable to establish an entitlement to the damages it seeks, any determination of the jurisdictional question will be largely academic.

40. Similarly, in the case at hand, we are of the view that although the mark-up grievance as stated clearly raises jurisdictional issues, these issues probably arise only if and when liability has been determined against the respondents and the Board is asked to award a remedy. We are satisfied that, particularly in light of the section 91 complaint which contains overlapping issues, we ought to proceed to determine the liability issues, which do not depend on a determination of work jurisdiction.

41. We therefore direct that the mark-up grievance be joined for hearing with the section 91 complaint. If liability under the grievance is established, we will hear the evidence and representations of the parties as to whether the remedy requested by the applicant can be issued without engaging in a determination of work jurisdiction. If it cannot, this Board can decide at that time whether it ought to defer the decision on remedy pending the filing and resolution of a jurisdiction dispute complaint.

42. The work assignment grievance is more troubling to us. More so than the failure to hold a mark-up meeting, the re-assignment of work is clearly a work jurisdiction issue. It is the type of issue which section 93 of the Act addresses and which the terms of this collective agreement appear to intend the Plan to resolve. For this reason, we decline to hear this grievance, preferring to allow the parties an opportunity to file a section 93 complaint or a complaint to the Plan. If no proceeding is filed within three weeks of receipt of our decision, any party may request the Board to re-list the grievance for hearing.

III - Amendment of Section 91 Complaint

43. We turn now to the request by counsel for Local 598 to amend its section 91 complaint to add section 93(14) of the Act. The Board has a general discretion under section 83 of the Board's Rules of Procedure to grant leave to a party to amend a complaint, whether the request is made before or at the hearing. Among the factors which we view as relevant in deciding whether to grant leave are: the stage of the proceedings at which the request to amend is made, the prejudice to another party (in particular, whether the other party has an opportunity to present a case in response to the amended complaint), whether the amendment sought could be adequately dealt with in a separate proceeding, to what extent the amendment raises new issues and particulars, the reasons for the failure to plead the amended complaint originally, and our sense of the logic in having certain matters dealt with together.

44. This list of factors is not exhaustive, but sketches out some of the considerations which we have applied in deciding the issue in this case. We have decided, in light of these considerations, to grant leave to Local 598 to amend its complaint. We do not agree with the submissions by counsel for EPSCA, Hydro and the Labourers that the amendment creates an entirely different complaint than the one alleged originally. In fact, in reviewing the particulars in the complaint, it is clear that the crux of the allegations is that EPSCA and Hydro have persistently refused to comply with determinations of work jurisdiction under the Plan. In the complaint as originally filed, the complainant seeks to have the Board determine whether this is true, and if so, whether the conduct of the respondent violated section 65 and 67(a) and (c) of the Act.

45. Section 93(14) appears to direct parties to a collective agreement to abide by decisions of a tribunal to whom a work assignment dispute has been referred under the provisions of the agreement. Without wishing to give a precise interpretation of this section, it does not appear to us on a first reading to broaden the issues raised in this complaint. In fact, it may do no more than duplicate part of the complaint under section 65 and 67(a) and (b) wherein Local 598 complains of failure by the respondents to abide by work jurisdiction determinations.

46. Both opposing counsel have suggested that Local 598 ought to file a separate complaint with respect to section 93(14) instead of being permitted to amend its present complaint. This does not seem to us to be a practical suggestion, since a separate complaint would cover many of the same issues as those already raised and would likely result in either a duplication of proceedings or consolidation in any event.

47. With respect to the potential prejudice to the other parties, we note that Local 598 does not seek to add any new particulars. We will of course provide the parties with the opportunity to file amended pleadings in response to the amended complaint. However, counsel for the Labourers states that its position on the preliminary issue and its conduct at this day of hearing, including the agreement to admit certain documents, were based on the complaint as filed. Counsel asserts, in fact, that if the complaint had originally relied on section 93(14), the parties would have been saved the day of argument as to whether the issues are essentially jurisdictional in matter since reliance on section 93(14) would have been proof of that. Thus, counsel for the Labourers asks the Board to order the complainant to pay the costs of the Labourers of the proceedings to date (see para. 23 above).

48. We do not agree with the submission that had Local 598 relied on section 93(14) when it first filed its complaint, we would have been spared a day of argument on the preliminary matters. We would not view reliance on section 93(14) as indicating from the outset that a section 91 complaint ought to be deferred. As in any case where a party asks us to decline to hear a matter the Board should carefully scrutinize the real issues before deciding that a complainant ought to be deprived of the opportunity to have its case heard. Given the issues raised in the complaint and the position taken by Local 598 during its argument, it seems highly unlikely that it would have conceded to defer the section 91 complaint to a jurisdiction dispute proceeding. Further, as we have noted above, the addition of section 93(14) to the complaint requires no new particulars, but is based on those facts as already set out. Thus, the argument regarding deferral would have been made along the same lines, as would have our assessment of the matter. We agree that in some circumstances, an amendment made after preliminary motions have been argued and before evidence commences, may prejudice parties where the positions taken on the preliminary matters may be affected. In this case, and based on the submissions of the parties, we do not see this prejudice as a real possibility.

49. With respect to the agreement to introduce certain documents, our decision on the preliminary matters does not rely on any of the documents filed. Our decision is based on an assumption that the facts as contained in the complaint are true. Although counsel for Local 598 did not object to the documents being submitted to the Board, he specifically requested that in case of conflict between these and the pleadings, and for the purpose of the argument on the *prima facie* case, that the Board assume the complaint to be accurate. In light of this limited agreement, and the objections raised to the intended amendment, the Board will require any party who wishes to rely on the documents during the hearing into these issues to prove them in the usual way.

50. We do have some questions as to why section 93(14) was not raised until the first day of the hearing into the complaint, particularly when the issues were known to the complainant from the beginning of this process. Indeed, we have some questions as to why section 93(14) was not raised until the end of that day's argument. By this decision, we do not intend to encourage counsel and parties to file complaints which evolve over time and become a "moving target" for the other parties. In other circumstances, we may have been inclined to refuse the request to amend. In this case, however, the parties have all been aware of the substance of these matters well before the commencement of the hearing. For all of the reasons given, we will allow the section 91 com-

plaint to be amended. We are of the view that it makes practical sense to have all these issues brought before the Board to be heard together.

IV - Standing of the Labourers

51. As stated above, the Labourers request that they be given status in the current proceedings, a request which is opposed by Local 598. Counsel for the Labourers argued that the Labourers are an affected party which by law ought to be entitled to participate in these hearings. In addition to the cases cited above, counsel referred us to *C.U.P.E. v. Canadian Broadcasting Corp.* (1990), 70 D.L.R. (4th) 175 and *Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43* (1989), 5 L.A.C. (4th) 404 (Stanley). In *C.U.P.E. v. Canadian Broadcasting Corp.*, the Ontario Court of Appeal held that there had been a denial of natural justice when an arbitrator made a decision concerning work assignment without giving notice of the proceeding to the union which was opposed in interest. The court adopted what it called a “common-sense” approach, stating:

Continuing with a common-sense analysis, we have a two-party dispute in which the employer has limited interest and a third party's agreement has been interpreted, leading to an award that effectively directs the transfer of work assignments while the individuals who suffer are left to pursue grievances under their own collective agreements in hope of receiving a conflicting decision.

52. The court was of the view that the right to intervene in a proceeding ought not to be restricted to those parties with a strict legal interest. Counsel for the Labourers argues that the determination of the current complaint and grievances will directly affect the employment opportunities of members of the Labourers. If Local 598 is successful in the hearing, the result will be that the Labourers will not get the work in question. He referred us to the provisions in the collective agreement for resolution of work assignment disputes, under which all affected parties are granted status. In sum, counsel states that the Board ought not to treat what is essentially a three-party dispute as a two-party dispute, by denying status to the Labourers.

53. Counsel for EPSCA and Hydro echoed the arguments above. In his submission, the Board ought to recognize the fact that the work assignment disputes which are the basis of the complaint and grievances have been referred to the Plan for determination. In those proceedings, all affected parties have an opportunity to make representations.

54. Counsel for Local 598 argues that to the extent there existed three-party work assignment disputes, Local 598 has followed all the required procedures for having these resolved. Under those procedures, the Labourers had full opportunity to participate. The complaint, however, is about an allegation that the respondents simply do not want to have Cement Masons on Hydro sites. Counsel reiterated that the issues placed before the Board in these proceedings are not work assignment disputes, but the conduct of Hydro.

55. We have decided to grant full standing to the Labourers in these proceedings. The Board has the discretion to grant status to an outside party where appropriate. Whether or not the Labourers can be said to have a strictly legal interest in these matters we are of the view that it makes sense, in the context of this case, to have the Labourers participate. In the course of these proceedings, this panel may have to interpret decisions or agreements under the Plan in order to decide whether the respondents have failed to abide by them. The decisions or agreements were the result of a three-party process under the collective agreement which binds both unions. In our view, it would only be fair to allow the Labourers to participate in a proceeding in which a party seeks to enforce these decisions or agreements. Since we have decided that the section 91 com-

plaint will be heard together with the mark-up grievance, the Labourers will be permitted to present evidence and make submissions on all issues under these proceedings.

56. We therefore direct that the section 91 complaint (Board File No. 1887-90-U), and the referral of the mark-up grievance (Board File No. 1586-90-G) be listed for hearing together and that three days of hearings be scheduled at the outset. The Labourers shall have full standing with respect to all issues. The work assignment grievance (Board File No. 1587-90-G) is adjourned on the terms specified in paragraph 42 above, pending the filing of a complaint under section 93 of the Act or in accordance with the procedures under the collective agreement. We also direct that the respondents and the Labourers file their amended pleadings in response to the matters raised in the complaint and grievance by one week prior to the next hearing date.

2554-91-G International Union of Elevator Constructors, Local 50, Applicant v. Otis Elevator Co., Respondent

Construction Industry - Construction Industry Grievance - Whether attending training course just outside Metro boundaries, as required by employer, entitling grievors to travel allowance under collective agreement - Board rejecting employer's distinction between assigning duties and assigning work - Employees entitled to travel allowance - Grievance allowed

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *E. del Junco* and *Tom McCana* for the applicant; *Ross Dunsmore*, *Ed Wyzykowski* and *David McColl* for the respondent.

DECISION OF THE BOARD; January 17, 1992

1. The applicant, the International Union of Elevator Constructors Local 50 (the "union" or "Local 50") has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination pursuant to section 126 [formerly section 124] of the *Labour Relations Act* (the "Act").

2. Local 50 and the respondent, Otis Elevator Co. (the "company" or "Otis") are bound to the provincial collective agreement between the National Elevator and Escalator Association (the "association") and the International Union of Elevator Constructors. The respondent does not dispute that it is a member of the association, and its name appears in the membership list set out in Appendix "C" to the collective agreement.

3. The grievance alleges that Otis is in violation of Article 12.05.01 of the collective agreement in that it failed to pay travelling time to certain employees. The facts in this case are quite straight forward and were essentially agreed upon by the parties.

4. Otis made arrangements for nine employees to attend a training course in October, 1991. The relevant part of that Notice reads as follows:

FROM: David McColl,
Field Operations Manager - Service

SUBJECT: Elevonic 411 Training
October 8, 9, 10, 1991

You have been selected to attend the Elevonic 411 Training Program at the Training Centre on The Queensway on October 8, 9 and 10, 1991.

You should report to The Queensway Training Centre at 7:30 a.m. all three days.

Following coffee and donuts the programme will commence at 8:00 a.m. sharp and run until 5:00 p.m.

"David McColl"

DMcC:bas

The nine employees who attended the course are Gary Heck, Steve Prior, Peter Beauvais, Mike Johnson, Bill Robertson, Norm Blady, Peter Doric, Pat Joyce and an employee whose last name is Baxter. All of these employees are members of Local 50 and are employed by Otis as mechanics engaged in maintenance work. These particular employees do not perform construction or modernization work, nor do they perform general repairs.

5. The attendance of the employees at the course was compulsory and they were paid their regular wages and benefits. This course was part of regular upgrading courses that Otis expects its mechanics to attend approximately once per year.

6. Otis recently opened a new training centre, located at 1655 The Queensway. The course in question, was the first one held by Otis in the new training centre. Prior to this it had conducted the training courses in various hotels. 1655 The Queensway is outside the Metro boundaries but within a forty mile radius from City Hall, Toronto. All of the nine employees who attended the course work out of Otis's downtown office and are regularly assigned to work within Metro's boundaries. Mechanics do not normally report to their office but go directly to the job (or jobs) they have been assigned to on any given day.

7. As noted, the grievors in this case received their regular wages and benefits for the days spent in attendance at the course. They did not however, receive travel time as they feel they are entitled to under Article 12.05.01 of the collective agreement. Article 12.05.01 of the collective agreement reads as follows:

12.05.01 Local 50 - Toronto

(a) It is agreed that all employees covered under this Agreement who are working on Construction, Modernization or Scheduled Repair Work in the area bounded in the north by Eglinton Avenue, in the east by Bayview Avenue and Bayview Extension and a straight line from the Bayview Extension to the north shore of Lake Ontario, in the west by Bathurst Street, and in the south by the north shore of Lake Ontario shall be reimbursed in the amount of four dollars (\$4) per day per employee.

(b) It is further agreed that all employees covered under this Agreement who are working on Construction, Modernization or Scheduled Repair work in the area in the north bounded by Wilson Avenue and York Mills Road to Victoria Park Avenue, south on Victoria Park Avenue to Ellesmere Road, then east on Ellesmere Road to the present Metro Limits, in the west from Royal York Road to the present Metro limits, in the east from Birchmount Road to the present

Metro limits, shall be reimbursed a travel allowance of thirty (30) minutes each way. The southern limit will be the north shore of Lake Ontario.

(c) It is further agreed that the allowances referred to in (a) and (b) above are not applicable to work performed by any classification of employee not specifically mentioned in (a) and (b) nor shall they be applied to areas other than those specified in (a) and (b).

(d) In the area between the present Metro boundaries and the limit of a forty (40) mile radius from the City Hall, Toronto, each employee assigned to work in the area shall be reimbursed forty-five (45) minutes, each way, per day worked, as a total expense remuneration.

(e) In the area between the forty (40) mile radius from the City Hall, Toronto, as described in (d) above, and a radius of one hundred and fifty (150) miles from the City Hall, Toronto, each employee assigned to work in the area shall be reimbursed sixty dollars (\$60.00) per day worked, effective on date of signing. Effective May 1, 1989, this will increase to \$70.00.

(f) In any area beyond the one hundred and fifty (150) mile radius as described in (e) above, each employee assigned to work in the area shall be reimbursed four hundred and twenty dollars (\$420.00) per week for each full week assigned. Effective May 1, 1989 this will increase to four hundred and ninety dollars (\$490.00) per week for each full week assigned. In the event that the employee spends less than a full week during any period of assignment in the area described in this paragraph, he shall be reimbursed for such period of less than one week's duration at the diem rate as specified in (e) above.

(g) It is understood that, should the amounts specified in paragraphs (e) and (f) be deemed insufficient to provide reasonable compensation for food, shelter, and incidental expenses for the employee concerned, the amounts may be adjusted by agreement between the Employer and the Union. The Employer may require that legitimate receipts be furnished by the employee to substantiate such request for increased compensation. It is further agreed that where the actual expenses fall below the amounts now agreed on, the amount may be adjusted by agreement between the Employer and the Union.

8. Other relevant portions of the collective agreement read as follows:

RECOGNITION CLAUSE

• • •

2.02 The Union recognizes that it is the responsibility of the Employers, in the interest of the purchaser, the Employers and their employees, to maintain the highest degree of operating efficiency and to continue technical development to obtain better quality, reliability, and cost of its product, provided, however, that this provision is not indented to affect the work jurisdiction specified in Article 4 and Article 4(A), and the work jurisdiction as specified in other Articles of this Agreement.

2.03 Without limiting the generality of the foregoing, and subject to the other provisions of the Agreement, the Employers shall have the right to:

- (a) Select personnel, hire, assign work or duties, transfer, layoff and recall employees;
- (b) discipline or discharge for just cause;
- (c) establish and enforce reasonable rules of conduct to be observed by employees.

• • •

MAINTENANCE

9.01 Maintenance work (Contract Service) is hereby defined as any contract obtained by an Employer for regular examination or care of apparatus enumerated in Article 4 and Article 4(A) of this Agreement, for a period of not less than one (1) month. Maintenance work shall be exclusively performed by Elevator Constructor Mechanics and Elevator Constructor Helpers.

...

9.03 It is agreed the regular working day shall consist of eight (8) hours between 8:00 a.m. and 5:00 p.m. five (5) days per week, Monday to Friday, inclusive. It is agreed that in order for call-backs to be answered in downtown business areas or similar business areas, an Employer may assign a Mechanic or Mechanics to remain at a mutually agreed building beyond regularly established working hours not to extend beyond 6:30 p.m. For all such work beyond his regularly established working hours, the Mechanic or Mechanics shall be paid at the rate of time and one-half. Should such assigned Mechanic or Mechanics be authorized to continue work on a job when a call-back extends beyond 6:30 p.m. he or they shall receive travel time and travel expense home. Where a holiday occurs, Monday through Friday, inclusive, the work performed on Saturday during the week in which any such holiday occurs shall be a time and one-half the single time rate.

...

9.08.02 The Employer shall have the option of paying standby under one of the following three (3) methods if a standby list is necessary:

a) -Mechanics assigned a duty period covering Monday to Friday shall be entitled to two (2) hours pay per duty day at Mechanics rate of pay.

- Mechanics assigned a duty period covering Saturday, Sunday or a Holiday established under Article 6 of the Agreement shall be entitled to two (2) hours' pay per duty day at Mechanic's rate of pay.
- The paid standby hours applicable to a duty day shall be reduced by the hours spent responding to calls on that day, under option (a);

OR

b) - Mechanics assigned a duty period covering Monday to Friday shall be entitled to one (1) hours pay per duty day at Mechanics rate of pay.

- Mechanics assigned a duty period covering Saturday, Sunday or a Holiday established under Article 6 of the Agreement, shall be entitled to two (2) hours pay per duty day at Mechanics rate of pay.
- The paid standby hours applicable to a duty day shall not be reduced by the hours spent responding to calls on that day, under option (b):

OR

c) - Mechanics assigned a duty period of seven (7) days will receive standby at the rate of 112-1/2% of the Mechanics rate for all hours worked whether straight time or the overtime rate for that period of time that he is on standby.

...

9.08.05 Travel time from home to job and from job to home on an overtime call-back (starting after regular working hours and terminating before start of regular working hours) shall be paid for at the same overtime rate applying to the work. Travel expenses on an overtime call back shall be paid as agreed in Article 12.

...

12.01 It is agreed that when an Elevator Constructor Mechanic or a Helper is sent outside of the jurisdictional radius covered in this Agreement, travelling time will be paid at single time rate for the actual hours travelled during regular working hours. Additional travelling time up to five (5) hours will be paid, at single time rates, for the actual hours travelled beyond regular working hours the first day only. If the trip requires more than one (1) day, travelling time will be paid at single time rates for the actual hours travelled during regular working hours the second, third, or fourth day and any additional days necessary to complete a trip. Expenses incurred during the trip shall be paid for by the Employers.

12.02 Under 12.01, overtime travelling is defined as follows:-

“Additional travelling time up to five (5) hours will be paid at single time rates for the actual hours travelled beyond regular working hours the first day only.”

This ruling applies generally only to planned work on out-of-town assignments where the Mechanic has prior notice of a trip.

• • •

12.04.01 Transportation

The method of transportation from job to job during regular hours, overtime hours or travelling time authorized by the Employer, shall be that for which the Employer will accept responsibility and give monetary recognition. It is agreed that, when employees agree to use their personal vehicles for transportation as outline in this provision, they shall be reimbursed at the rate of thirty-two (32) cents per kilometer effective on signing. Effective May 1, 1989 they shall be reimbursed at the rate of thirty-four (34) cents per kilometre.

The Employer shall also assume the cost of the difference between the employee's own standard insurance and necessary business insurance.

It is understood that there will be no geographical restrictions on the use of personal or company vehicles. Employees will not be required to carry material other than their own personal tools in their personal vehicles.

• • •

9. Counsel for the union argued that in attending the course put on by Otis the grievors were under the employers direction and control and that in upgrading themselves they were rendering a service which should be compensated. In fact, the grievors were paid their regular wages and benefits but not travel time. Counsel pointed out that Article 12.05.01(a) and (b) dealt with employees regularly engaged in construction, modernization or scheduled repair work, not the type of work the grievors normally engaged in. Counsel pointed out that the maintenance mechanics do not get the expense allowance provide in 12.05.01(a) and (b). Counsel argued however, that the maintenance mechanics were covered by 12.05.01(d) when they worked outside the Metro boundaries. It was his position that the grievors were therefore entitled to a travel expense equal to 1.5 hours per day. The payment in 12.05.01(d) is not tied to actual travel time but is an expense payment based on a formula. In attending the training course counsel argued that they had been “assigned to work” outside the Metro area and were therefore entitled to the expense remuneration provided in Article 12.05.01(d). Counsel referred the Board to *Beckett Elevator Company Limited*, [1978] OLRB Rep. June 485; *Rosmar Drywall & Acoustic Limited*, [1990] OLRB Rep. Feb. 214; *Re Steinberg Inc.* 20 L.A.C. (3d) 289 and *Dominion Stores Ltd.* 20 L.A.C. (2d) 118.

10. Counsel for the employer took the position that in attending the training course, the grievors were not performing “work” as it is defined in the collective agreement. He pointed to the use of the words “assign work or duties” in Article 2.03(a) of the collective agreement and argued that “work” and “duties” should be given distinct meanings in the collective agreement. Counsel argued that attending a training course was a duty. The other duty outlined in the collective agreement pursuant to Article 9.08.02, is stand by duty. Counsel contended that performing stand by duty or attending a training course was not work within the meaning of Article 12.05.01(d). He referred the Board to numerous articles in the collective agreement (which we do not propose to reproduce) defining work jurisdiction, repair work, construction work, maintenance work etc., in support of his contention that attending a training course was not work as defined by the collective agreement. Counsel for the employer also argued that Article 12.05.01 set up travel zones and travel times and that these were a product of the construction industry. In his submission the language did not entitle mechanics engaged in maintenance work to travel expense remuneration.

11. Counsel for the employer took the position that Article 4.09 was relevant to our determination. Article 4.09 states:

...

4.09 The industry, including its employees and customers, will be served by full utilization of the latest methods, techniques, technologies, tools and equipment available including communications equipment. Therefore, no restrictions shall be imposed on their use.

...

Counsel contended that in the circumstances of this case, if the union were to receive travel pay for attending training courses, this would cause additional cost to the employer and would constitute a restriction within the meaning of Article 4.09. He argued that imposing this additional cost would adversely effect the employers ability to conduct training. Counsel referred the Board to *Beckett Elevator Company Limited* unreported June 22, 1979. At the hearing of this matter counsel made reference to two other cases which he undertook to provide to the Board. As of the issuance of this decision we have not received them.

12. The issue to be decided therefore, is whether in attending the training course which was held just outside the Metro boundaries, as required by the employer, the grievors were entitled to the travel expense remuneration provided by Article 12.05.01(d). The parties agreed that as the past practice of the parties concerning the application of this article was contradictory, it would not be referred to. Nor was the Board provided with any bargaining history concerning this article. The purpose and scope of Article 12.05.01(d) must therefore be ascertained from the language used.

13. The employer in this case seeks to distinguish between assigning duties to an employee and assigning work to an employee. Counsel acknowledges that the grievors were assigned the duty of training and were therefore paid. He argues however, that they were not "working" so as to bring them within Article 12.05.01(d). Counsel did not provide the Board with any authority for this proposition nor was any evidence called in support of it. The Board can find no basis for supporting this distinction and cannot accept counsel's reasoning. In requiring that the maintenance mechanics perform the duty of attending a training course, and compensating them for so doing, the company was requiring them to work.

14. Counsel for the employer argued that Article 12.05.01 dealt only with the construction industry. On a plain reading of that clause, we cannot agree. Articles 12.05.01(a) and (b) specifically cover employees "working on construction, modernization or scheduled repair work". Article 12.05.01(c) reiterates and reinforces this. There is no such restriction to the type of work or type of employee covered by Article 12.05.01(d). The wording simply refers to "each employee" and does not stipulate the area that they must be working in. Had 12.05.01(d) been confined in its application to employees "working on construction, modernization or scheduled repair work" it would have been possible to accept the employer's interpretation. The wording is very clear and it cannot therefore be given the meaning suggested by counsel for the employer.

15. Counsel for the employer argues that if the employer had to pay travel expenses this would constitute a "restriction" within the meaning of Article 4.09. In this case the employer chose the location for its training course and required employees to attend. It had sole control over where the courses were to be conducted. Travel expense remuneration is provided for in the collective agreement and is only applicable in certain circumstances. The employer agreed to this clause and by its actions in this case has brought itself within it. The employer cannot now accuse the union of violating Article 4.09 by seeking to enforce its rights and, in circumstances covered by Article 12.05.01(d), obtain the travel expense remuneration to which its members are entitled.

16. We find therefore on the facts of this case that the employees who attended the training course were performing work on behalf of the employer. On the basis of the language in Article 12.05.01(d), as the site chosen for the course was just outside the Metro boundary, the employees are entitled to travel expense remuneration within the meaning of Article 12.05.01(d).

17. The Board remains seized of this matter in the event that the parties are unable to agree with respect to the implementation of this award.

1967-89-G Labourers' International Union of North America, Local 493, Applicant v. Steds Limited, Respondent

Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer submitting that grievance ought to be dismissed for reasons of delay, prejudice suffered as a result of such delay and that doctrine of laches applying - Employer also submitting that union's bargaining rights abandoned - Employer not suffering the prejudice asserted and Board finding no abandonment - Board finding union estopped from asserting its rights pursuant to ICI agreement, but not determining length of estoppel - Grievance dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair.

APPEARANCES: *S.B.D. Wahl* and *M. A. Ross* for the applicant; *Walter Thornton* and *C. Olmsted* for the respondent.

DECISION OF THE BOARD; January 8, 1992

1. This is a referral of a grievance to the Board pursuant to section 126 [formerly section 124] of the *Labour Relations Act* ("the Act"). The grievance was delivered by the applicant on October 26, 1989 and referred to the Board November 8, 1989. For ease of reference the Labourers' International Union of North America will be referred to as "the Labourers" or "the union". The various locals of the union will be referred to only by their local union number.

2. The respondent ("Steds" or "the employer") submits that this grievance ought to be dismissed for reasons of delay, the prejudice suffered by the employer as a result of such delay, and that the equitable doctrine of laches applies to the circumstances of this case. The employer also submits that the union no longer has bargaining rights with respect to its employees as any bargaining rights the union had have been abandoned.

3. At the commencement of the hearing, after hearing the submissions of the parties the Board orally ruled that it would not deal with the issue of delay on a preliminary basis.

4. When the Board commenced its hearing into this referral the panel of the Board consisted of Vice-Chair, L. Davie, with Board Members W. Gibson and C. A. Ballentine. As a result of Mr. Gibson's sudden death prior to the completion of the hearing the parties agreed on December 19, 1990 that this matter be continued before me as a single vice-chair.

Facts

5. The state of the evidence throughout this case was most unsatisfactory. This was undoubtedly due to the fact that the evidence related to events and circumstances which occurred more than twenty years ago. Similarly, the relevant documentary evidence is dated approximately twenty years ago. Some of the “key players” who could testify about particular events or the circumstances surrounding the signing of certain collective agreements have died. In particular, Steds points to the death of William Olmsted in 1987 as a factor which has prejudiced it in the presentation of its defense to this grievance.

6. Notwithstanding the sketchy evidence I have made the following factual findings based on the evidence before me and the usual factors which the Board considers in weighing and assessing such *viva voce* and documentary evidence including the credibility of the witnesses, what is reasonably probable in the circumstances and the reasonable inferences to be drawn.

7. Steds is a company engaged in construction activities primarily in the institutional and commercial sector of the construction industry. The company began its operations in North Bay in 1958. Since that time it has spent the vast majority of its time doing construction work in and around the City of North Bay in the District of Nipissing. It has also engaged in construction activities in the areas adjacent to the district of Nipissing including the districts of Parry Sound and Temiskaming. These areas were at all relevant times within the territorial jurisdiction of Local 493.

8. With the exception of the incidents referred to in this decision Steds has not performed construction work in the Kapuskasing area or in the area north of the 49th parallel, or in an area within 50 miles of the Timmins Federal Building. This fact took on some significance in the submissions of the parties and will be referred to in more detail.

9. I find that at all relevant times Steds has actively and openly engaged in its construction activities. It has been an active and visible construction contractor in the North Bay area for more than 30 years.

10. I find that throughout this time and more particularly from 1965 to the present Local 493 knew or ought to have known that Steds was engaged in construction activities within its geographic jurisdiction. Further, Local 493 knew or ought to have known that in carrying out its construction activities Steds employed persons to perform work which falls within the work jurisdiction claimed by the Labourers.

11. At all relevant times Steds used trucks which displayed the company name. Its common practice was to erect signs on its projects to indicate its involvement with the project. Steds often acquired jobs through tenders listed in the Daily Commercial News (“DCN”). Its successful tender on jobs advertised in the DCN would be reported in subsequent issues of the DCN. Over the years it performed a number of high profile jobs in Local 493’s area. I have evidence of in excess of 80 projects carried out by Steds from 1970 to the time of the filing of this grievance in 1989. Many of these projects involved additions to existing structures located on the main streets of the City of North Bay or surrounding towns. The projects included additions to existing retail stores or LCBO outlets, additions to industrial manufacturing facilities in busy industrial subdivisions, new construction of a much publicized building for the North Bay canoe club, construction of a new building for the OPP headquarters in North Bay, additions to schools etc. In the face of this evidence I do not accept that Local 493 did not or ought not to have known that Steds performed construction work within its territorial jurisdiction.

12. With the exception of the projects referred to hereafter all of these various projects

have been performed by Steds on a “non-union” basis. At no time, and more importantly from 1970 until the filing of the grievance in 1989 did Local 493 seek to enforce the bargaining rights which it asserts it has or enforce the collective agreements to which it alleges Steds has been bound.

13. In this case Local 493 has asserted that when province-wide bargaining was introduced, either one or all of Locals 491, 493, 607 and 1036 held bargaining rights. With the introduction of province-wide bargaining these bargaining rights “fed” the Labourers’ designation and the scheme of province-wide bargaining. Steds was therefore bound to the 1988-90 provincial agreement under which the grievance was filed. Bargaining rights could not be abandoned after province-wide bargaining was introduced. (*Lorne’s Electric*, [1987] OLRB Rep. Nov. 1405.) Although the union may have been lax in its enforcement of those rights, that fact is irrelevant as the issue of enforcement is distinct from the determination whether bargaining rights existed when the grievance was filed.

14. In addition to his arguments regarding delay and laches, counsel for Steds submits that *if* the union held bargaining rights at some point in time, those rights had been abandoned prior to the introduction of province-wide bargaining in 1978. Counsel for Steds did not assert that abandonment occurred after 1978. Rather counsel argued that evidence of the work practices of Steds after 1978 was relevant to his submissions regarding the principles of delay and laches, and as corroborative evidence that abandonment had occurred prior to 1978 (see *Marineland of Canada Inc.*, [1990] OLRB Rep. Dec. 1298).

15. It is therefore necessary to detail how the locals obtained the bargaining rights asserted and to determine whether any of the locals held bargaining rights at the commencement of province-wide bargaining in 1978.

Evidence Relating to the Acquisition of Bargaining Rights by Local 493

16. On May 27th, 1965 Mr. William A. Olmsted returned to Mr. E. Poitras a signed copy of a collective agreement between Steds Limited and the International Hod Carriers Building and Common Labourers Union of America, Local 493. That agreement was effective from April 30, 1965 to April 30, 1967. The relevant parts of Articles 3, 4, and 5 of that collective agreement state as follows:

Article 3 - AREA OF AGREEMENT

This Agreement shall be effective within a radius of fifty (50) miles from the Timmins Federal Building.

Article 4 - RECOGNITION

The Contractor recognizes only the International Hod Carriers’ Building and Common Labourers’ Union of America, as sole collective bargaining agents for all Labourers employed on the project of the Contractor with respect to rates of pay, hours of work and other conditions of employment. ...

Article 5 - UNION SECURITY

The Contractor agrees to hire only members of the Union during the term of this Agreement.

• • •

17. Mr. Charles Olmsted testified that it was his understanding this collective agreement was signed by his brother as a result of a job that Steds had at Nellie Lake near Iroquois Falls. He further testified that Allied Chemical, the owner/client for whom Steds was performing the work

required that the work be performed pursuant to a collective agreement with the Labourers union. As his brother was manager of the project and dealt with both the owner/client and the Labourers at the time, Charles Olmsted had little direct knowledge of the circumstances and events surrounding the signing of this collective agreement.

18. On August 3, 1967 Charles Olmsted acting on behalf of Steds signed a collective agreement with Local 493. This agreement was effective from June 14th, 1967 until April 30th, 1970. Articles 3, 4, and 5 of that agreement are similar but not identical to the expired collective agreement earlier signed by William Olmsted. The primary difference is in the "Area of Agreement" article which states:

Article 3 - AREA OF AGREEMENT

The rates of wages and working conditions shall be effective in the Town of Timmins and within a radius of fifty (50) miles from the Town of Timmins Federal Building.

19. Charles Olmsted testified that he remembered very little about signing this collective agreement. He recalled that at the time Steds had a contract to construct an addition to the Northern Telephone office in New Liskeard and that this owner/client also required Steds to have contractual relations with the Labourers union. New Liskeard however does not fall within the fifty mile radius of the Timmins Federal Building referred to in Article 3 of that collective agreement.

20. The trade union called no evidence about the events and circumstances surrounding the execution of these documents. At the time these agreements were signed Local 493's jurisdiction extended well beyond the 50 mile radius of the Timmins Federal Building referred to in Article 3 of each of the collective agreements. With the exception of the Allied Chemical project Steds has not performed any work in the 50 mile radius of the Timmins Federal Building.

21. On or about May 15th, 1970 Mr. William Olmsted signed a collective agreement between Steds Limited and Local 493. That agreement remained in effect until April 30, 1971 ("the 1970-71 agreement"). The relevant provisions of that collective agreement are found in Article 300 and Article 400 which state as follows:

ARTICLE 300 - AREA OF AGREEMENT

The rates of wages and working conditions shall be effective in the City of Sudbury and within a radius of thirty-five (35) miles from the city of Sudbury Federal Building.

ARTICLE 400 - RECOGNITION

The Employer recognizes only the Union as the sole collective bargaining agent for all Labourers and Working Foremen employed by the Employer with respect to rates of pay, hours of work, and other conditions of employment.

The agreement was signed on behalf of Local 493 by Mr. Bill Tyreman and Mr. Guy Papineau. Neither of these persons testified before the Board.

22. The evidence with respect to the events and circumstances surrounding the signing of this document is extremely sparse. There is no evidence for example to indicate that at this time Steds was performing or had performed work within the 35 mile radius referred to in Article 300 of the Agreement.

23. Michael Ross testified on behalf of the union. Mr. Ross first served as Local 493's busi-

ness agent in 1968. He became one of the business managers at the local in 1970-1971 and continued to serve in that capacity (and others) until the fall of 1990.

24. Mr. Ross testified that at the time this agreement was signed Local 493 had already established a pattern of bargaining with the Sudbury Construction Association (SCA). The SCA was an organization of employer contractors formed for purposes that included *inter alia* collective bargaining with the local unions who had contractual relations with the employers. I find that in 1970 there did exist a separate and distinct collective agreement between the SCA and Local 493 for the Sudbury area.

25. There was also some vague and sketchy evidence about a local North Bay collective agreement. That agreement covered the twenty mile area in and around North Bay. Negotiations with respect to that agreement may have been carried out by the SCA on behalf of certain North Bay contractors. It was also carried out directly between Local 493 and individual contractors resident in the North Bay area. Although counsel for the employer argued to the contrary I find that a "local" North Bay agreement did exist in or about 1970. Steds however was never a signatory to such a local North Bay agreement.

26. I find further that Steds has never been a member of the SCA. Having regard to the totality of the documentary evidence and the reasonable inferences that can be drawn from that evidence I conclude that when William Olmsted signed the 1970-71 agreement on or about May 15, 1970, Steds was *not* automatically bound to any collective agreement negotiated between the SCA and Local 493. There is no evidence before me to suggest that Steds had agreed to be bound to any collective agreement between the SCA and Local 493. Neither is there any evidence that prior to May 1970 Steds had authorized the SCA to bargain on its behalf or to act as its representative in negotiations with Local 493. I have therefore determined that in May 1970 (when William Olmsted signed this agreement) in order to assert *any* bargaining rights vis-a-vis Steds it was necessary for Local 493 to negotiate and conclude a collective agreement directly with Steds.

27. There are no further or other collective agreements between Steds and Local 493 signed by either Charles or William Olmsted. Neither is there any other document to which Local 493 can point signed by either Charles or William Olmsted or some other officer or official of Steds which has the effect of recognizing Local 493 as bargaining agent of any employees of Steds.

28. Local 493 submits that after the May 1970 collective agreement expired Steds nonetheless continued to be bound to recognize Local 493 in particular regions of Ontario because Steds was bound to certain collective agreements negotiated between Local 493 and the SCA.

29. The first piece of evidence led by Local 493 in support of its contention that Steds was represented by the SCA in negotiations with Local 493 and was thereby bound to the various collective agreements negotiated between the SCA and Local 493 is in the form of a registered letter dated March 24, 1971 in which Local 493 seeks to give notice to bargain for the renewal of a collective agreement.

30. Accompanying this letter is a Canada Post registration receipt containing the names and addresses of approximately 90 contractors throughout the Province of Ontario to whom the registered letter was sent. Next to 27 of these names are certain hand printed notations stating variously "okay SCA", "reply received March 29th", "Okay", "SCA", "Will sign", or some combination of these notations. The name and address of Steds appears on that registration receipt together with a hand printed notation "okay SCA". Both the letter and the registration receipt came from Local 493's file relating to the SCA.

31. There is no first hand or direct evidence about this notation. Mr. Ross testified the handwriting was that of Ms. Y. Cote, the secretary at his office. Having not made the notation himself Mr. Ross could not testify as to its meaning and had no knowledge when it was made and from where or whom the information “okay SCA” had been received.

32. Local 493 points to a letter dated March 30th, 1971 which William Olmsted wrote to Mr. Ross as authorization from Steds to the SCA to negotiate on its behalf. That letter states as follows:

Following your telecon to this office of March 29th, we confirm our statement that if, as and when, Steds Limited proposes to perform work in Sudbury, we will then pickup the current agreement in force as between your local and the Sudbury Builders Exchange, General Contractors Section.

Mr. Ross did not testify about his “telecon to [Steds] office of March 29th”.

33. The remaining items of documentary evidence upon which Local 493 relies to assert that Steds was bound to a series of collective agreements it had with the SCA (and later the Construction Labour Relations Association of Ontario (CLRAO) acting on behalf of the SCA) consists of Steds placement on a number of lists prepared by either the SCA or Local 493.

34. There is no evidence as to the compilation of any of these lists. The evidence discloses that the various lists were received and relied upon by Local 493. There is no evidence however about how or why or whom placed Steds’ name on these lists.

35. Steds was not aware that its name appeared on any of these lists. It was never a member of the SCA and was not aware that the SCA purported to negotiate on its behalf. As between Steds and the SCA there is no evidence Steds ever authorized the SCA by way of proxy or otherwise to act as its representative in negotiations with the union or its locals. It did not ever receive copies of any of the collective agreements negotiated by the Labourers with either the SCA or CLRAO to which Local 493 asserts it was bound. Steds did not receive any notification or communication from anyone to indicate that the SCA and/or the trade union and its various locals considered Steds bound to these collective agreements. Rather Steds continued to operate its business in a visible and non-union fashion. It did not consider itself bound to any collective agreements (at least at the expiration of the May, 1970 agreement on April 30th, 1971) and did not apply the terms or conditions of any collective agreement to the labourers it employed. It would seem from the evidence that in this regard Steds and Local 493 were truly like ships passing in the night with neither knowing the position of the other.

Evidence Relating to Locals 491 and 1036 Bargaining Rights

36. As between Locals 491 and 1036 and Steds there are no direct collective agreements signed by Steds. Any bargaining rights that exist for either of these two locals at the time of the commencement of province-wide bargaining arise by reason of the collective agreements signed by William Olmsted in 1965 and Charles Olmsted in August 1967 and later collective agreements negotiated by the SCA and/or the CLRAO with the union.

37. In November 1974 a new local of the Labourers’ Union was chartered. This new local, known as Local 491 was given jurisdiction over the Timmins area (that area which the Board now refers to as Board area #19).

38. On May 1, 1973 prior to the chartering of Local 491 the SCA had entered into a collec-

tive agreement with Local 493 which contained the following provisions relating to recognition and union security:

2.01 The Employer for itself, its Employers section and members, recognize the Local Union as the sole and exclusive bargaining representative of their members for the purpose of entering into this Collective Agreement covering the City of Sudbury and within a radius of 35 miles from the City of Sudbury Federal Building; and similarly, the Local Union recognizes the Employer as the sole representative of its Employer sections and the Employer members of its sections, for the purpose of entering into this Agreement.

2.02 The Employer recognizes the Union as Bargaining Agent for Labourers outside the geographic area of this Agreement for those areas in the Province of Ontario where the Union holds bargaining rights.

39. Counsel for the Labourers submitted that although there was no evidence that the 1967 agreement with Steds was re-negotiated by Local 493 after its expiry in 1970, Local 493's bargaining rights for the "Timmins area" were acknowledged and continued by virtue of Article 2.02 of the 1973 collective agreement with the SCA. These bargaining rights were transferred to Local 491 when it was chartered and given jurisdiction over the Timmins area.

40. Counsel for the Labourers further asserted that in 1975 Local 493, Local 491 and Local 1036 and Steds were all bound to a collective agreement between the CLRAO "on behalf of the Sault Builders Exchange and the Sudbury Construction Association, for their listed members attached hereto, hereinafter referred to as ('the employer')" and "Labourers' International Union of North America, Ontario Provincial District Council, on behalf of Local Unions 491; 493 and 1036 and said locals individually to be hereinafter called ('the union')". A list of contractors apparently compiled by the SCA and which included Steds' name was appended to that agreement. That agreement provided as follows:

The Employer recognizes the local Union as the bargaining agent for all employees covered by this Agreement while working within the District of:

Algoma
Sudbury
Manitoulin Island
Nipissing
Parry Sound
Temiskaming

and that portion of the District of Cochrane lying south of the 49th Parallel, where the local Union holds bargaining rights.

That agreement was subsequently re-negotiated between those same parties and without change to the recognition provision until province-wide bargaining was introduced.

41. The trade union asserts that the CLRAO collective agreement constitutes voluntary recognition by Steds of the unions' bargaining rights in the District of Algoma over which Local 1036 has jurisdiction.

42. Local 493 asserts that these events establish a clear and clean chain of bargaining rights in the Timmins and Sault Ste. Marie areas up to 1978. Steds did not perform any work in the Timmins area after 1970. It has not performed any projects in the district of Algoma since 1975 (and has done only one project in that area since 1970).

Evidence Relating to Local 607's Bargaining Rights

43. The only evidence regarding Steds' recognition of Local 607 at any point in time came through the *viva voce* evidence of Charles Olmsted and certain documents which were placed in evidence on consent.

44. On or about June 23, 1970 Charles Olmsted signed a "working agreement". That working agreement is a simple, single page document which in its entirety states as follows:

WORKING AGREEMENT

AGREEMENT DATED the 23 day of June 1970 A.D.

BETWEEN: STEDS LIMITED

Hereinafter referred to as the Company

- and -

LOCAL 607, LABORERS INTERNATIONAL UNION OF NORTH AMERICA

Hereinafter referred to as the Union

PURPOSE

1. The general purpose of this Agreement is to establish mutually satisfactory relations between the company and its employees; to eliminate unfair practices; to establish and maintain satisfactory working conditions, hours of work and wages and to stabilize conditions in the construction industry.

RECOGNITION

2. The Company recognizes the Union as the sole and exclusive collective bargaining agency for all construction laborers in all matters pertaining to wages, hours of work and working conditions, as in the current collective agreement between Local 607 and certain employers.

WAGES, HOURS AND WORKING CONDITIONS

3. The Company agrees to recognize and be bound by the Agreements existing from time to time between Local 607 and certain employers with whom the Union normally bargains with in the industry and specifically agrees that the provisions relating to wages, hours and working conditions set forth in the said agreements shall be binding on the Company. In the event any of the said conditions set forth in said agreements are altered or amended to at any time by negotiations, the Company shall be bound by such alternations and amendments. The agreements referred to herein are maintained in a registered file at the office of the Union at Room 17, Lakehead Labour Centre, Fort William Road, Thunder Bay, Ontario and are available for inspection by the Company at all reasonable times.

TERMINATION

4. This Agreement will remain in force for a period of one year, from the date hereof, and shall continue in force from year to year thereafter, unless in any year not less than 60 days, before the date of its termination either party shall furnish the other with notice of termination of or proposed revision, of this agreement.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

SIGNED ON BEHALF OF THE COMPANY
STEDS LIMITED
("C. E. Olmsted")

SIGNED ON BEHALF OF THE UNION

("Carl Schelle")

45. Mr. Olmsted could remember very little about signing this agreement. He recalled the project upon which Steds was engaged at the time was the Andre Carey School in Kapuskasing. He testified Kapuskasing was a "union oriented" town and that Steds was therefore obliged to employ members of the Labourers union to ensure an adequate labour force and avoid any possible job interruptions as the other trades on site were unionized.

46. Mr. Olmsted recalled he signed the agreement on one of his visits to the job site and thought that a meeting for that purpose had been set up by his site superintendent. At the time Mr. Olmsted discussed with the union representatives his obligations pursuant to the agreement including such matters as rates of pay etc. He could not recall whether or not he ever received any collective agreement then applicable between Local 607 and certain employers as referred to in article 3.

47. Charles Olmsted had no specific recollection of any statements made during the meeting which caused him to conclude that the working agreement was only applicable to the specific job at which Steds was then engaged. Nevertheless his recollection of the circumstances was that the agreement was applicable only to that particular project. Although vague his recollection was that the union representative agreed that Steds "could have a site agreement for this project". Although he "might have", Charles Olmsted could not recall whether he or the union representative for Local 607 signed anything other than the working agreement which would limit the union's rights or Steds' obligations to that particular site.

48. The union representative who signed the document on behalf of Local 607, Carl Schelle did not testify. His whereabouts are unknown.

49. On or about October 21, 1971 Mr. William Olmsted signed a "standard form" collective agreement. Mr. J. A. McCutcheon signed the agreement on behalf of Local 607. Neither signatory testified. From the evidence of Mr. Little who has been the business agent and later business manager of Local 607 since 1974 I conclude that this standard agreement is the same agreement to which reference is made in paragraph 3 of the working agreement.

50. The evidence indicates that except for the Andre Carey School job, Steds never again worked within Local 607's jurisdiction and was not working in that area when this standard form collective agreement was signed by William Olmsted.

51. At or around this time however Steds was working on a pipeline project in Ramore. Ramore was not within Local 607's jurisdiction however and at the time fell within the territorial jurisdiction of Local 493. Ramore also is not within 50 miles of the Timmins Federal Building.

52. On September 3rd, 1971 Local 493 applied to be certified for "all construction labourers employed by [Steds] while working within a fifty mile radius of the Timmins Federal Building". On September 16th, 1971 the Board dismissed Local 493's application for failure to file with the Board membership evidence or the declaration concerning membership evidence.

53. In its reply to that application dated September 10th, 1971 Steds named Local 607 as a "trade union known to the respondent as claiming to be the bargaining agent of or to represent any

employees who may be affected by the application". It referred to the time period specified in the working agreement in that paragraph of the reply in which it indicated it was "bound by a collective agreement". Finally, in "other relevant statements" Steds states as follows:

13. Other relevant statements (*use addition pages if necessary*):

While working in Kapuskasing in 1970, Steds Limited signed an agreement with Local No. 607, which claims jurisdiction of the geographical districts of Kenora, Kenora Patricia, Rainy River, District of Thunder Bay and District of Cochrane.

Ramore is in the District of Cochrane.

No further building contracts presently being contemplated in this area.

The reply is signed by William Olmsted.

54. Charles Olmsted stated that the Ramore job was a subcontract from Adam Clark Company and was therefore performed on a "union basis". He did not know however which collective agreement was applied to the job (whether the Labourers pipeline agreement for Canada or some other local agreement) or which local (whether Local 607 or Local 493) was recognized on the job by Steds. It was his brother who attended the pre-job mark-up with Adam Clark and who was responsible for the job.

55. Finally there is a letter dated February 16th, 1978 purportedly sent to Steds by the business manager of Local 607 (who did not testify) by registered mail. The letter gives notice to bargain and makes reference to the newly enacted province-wide bargaining scheme. There is no evidence before me that this letter was ever received by Steds. The address on the Canada Post registration receipt was not the then current address of Steds as the company had moved its offices in 1972 or 1973.

The Position of the Union

56. Counsel for the Labourers submitted that there were four separate lines of bargaining rights established by the evidence. First, the Timmins area bargaining rights established by the 1965-1967 and 1967-1970 collective agreements with Local 493. These Timmins area bargaining rights were continued by reason of the agreements negotiated with the SCA and the CLRAO. In particular, Article 2.02 of the 1973-1975 collective agreement, and the recognition article in the 1975-1977 agreement obliged Steds to recognize first Local 493 and later Local 491's bargaining rights in the Timmins area.

57. The second line of bargaining rights related to the Sudbury area. Counsel referred to the 1970-1971 collective agreement signed by William Olmsted to establish Local 493's Sudbury area bargaining rights. He argued these rights were continued through the various collective agreements negotiated between the SCA and the CLRAO and Local 493.

58. The third line of bargaining rights related to those acquired by Local 1036 by reason of what counsel asserts was the voluntary recognition extended to that Local in the 1975-1977 collective agreement between the CLRAO and the three locals.

59. With respect to each of these three lines of bargaining rights counsel argued that William Olmsted's letter of March 30, 1971 was a representation from Steds that it agreed to be bound to the SCA negotiated collective agreements. Having regard to that letter it was reasonable for the union to accept and not question Steds' name on the various lists which it received from the SCA after that letter. Counsel asserted that the various lists served to bring this matter within the pur-

view of section 52 [formerly section 51] of the Act and binds Steds to the SCA negotiated collective agreements. Counsel argued that membership in the employer's organization is irrelevant under that provision.

60. Section 52 states:

52.-(1) A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers' organization and each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement, and, if any such person ceases to be a member of the employers' organization during the term of operation of the agreement, the person shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.

(2) When an employers' organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers' organization for whose employees the trade union or council of trade union is entitled to bargain and to make a collective agreement at that time, except an employer who, either alone or through the employers' organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that the employer will not be bound by a collective agreement between the employers' organization and the trade union or council of trade unions.

...

61. Counsel for the Labourers submitted that the first part of section 52(2) which requires an employer's organization such as the SCA to deliver to the trade union a list of contractors on whose behalf it is bargaining is a statutory adaptation of the law of agency principles relating to actual and ostensible authority. Contractors whose names appear on the list provided by the employer organization are bound to the collective agreement negotiated by that organization. The latter provision of section 52(2) deals only with the circumstances where no list is delivered. In that case all members of the organization are bound by reason of the deemed authority given to the organization of which the contractor is a member. The public policy promoted by section 52 and the Board's jurisprudence with respect to that section is to encourage a standard area collective agreement negotiated by employer's organizations. That public policy would be undermined if the trade union were required to look behind the lists and concern itself with whether a contractor was/was not a member of the organization or did/did not authorize the organization to negotiate on its behalf. Section 52(2) and the delivery of the lists negate any concern by the union to determine the indoor management of the employer's organization.

62. In support of his argument that section 52 applied and was dispositive of Steds obligation to be bound to the SCA negotiated collective agreements counsel cited *Fullerton-Weston Publishing Ltd. et al v. Brown et al and Toronto Printing Pressmen and Assistants' Union No. 10* (1971) C.L.L.C. 14,083; *Bruce Henderson Limited*, [1977] OLRB Rep. Aug. 480; *Paul D'Aoust Construction Limited*, [1976] OLRB Rep. Sept. 529; *MacGregor Crane Service Limited*, [1979] OLRB Rep. Aug. 777; *Delta Plumbing and Heating*, [1964] OLRB Rep. Oct. 329; *Twin Electric*, [1984] OLRB Rep. Feb. 393; *Baker Gurney & McLaren Ltd.*, [1976] OLRB Rep. Mar. 78; *David Yan Construction Ltd.*, [1984] OLRB Rep. May 715; *L.M.L. Foods Inc.*, [1985] OLRB Rep. Aug. 1252.

63. Alternatively, counsel submitted that Steds' letter of March 30th, 1971 and its subsequent appearance on the various lists constituted a representation that the SCA had actual or

ostensible authority to negotiate on behalf of Steds. In support counsel referred to *Inspiration Limited*, [1967] OLRB Rep. Sept. 561; *Collegiate Sports Ltd.*, [1977] OLRB Rep. Aug. 487; *Vic Starchuk & Associates Inc.*, [1980] OLRB Rep. Apr. 516; *Hussey Seating Company (Canada) Limited*, [1981] OLRB Rep. Aug. 1138; *Maple Leaf Taxi Company Ltd.*, [1982] OLRB Rep. Nov. 1671.

64. In response to Steds' position that Local 493 or any of the other locals had abandoned its bargaining rights counsel argued that the union could not enforce rights it did not have. Counsel asserted that prior to the 1975 agreement with the CLRAO none of these locals held bargaining rights for the District of Nipissing and the City of North Bay where Steds performed most of its work. In particular Local 493 held bargaining rights only for the Sudbury and Timmins area where Steds did little if any work.

65. Counsel for the Labourers' argues that prior to the 1973 SCA negotiated agreement its bargaining rights vis-a-vis Steds were limited to the Timmins and Sudbury area and did not extend to any other geographic area within its jurisdiction. As a result of the inclusion of Article 2.02 in the 1973 SCA negotiated agreement, Local 493 could *perhaps* for the first time assert bargaining rights with respect to Steds' employees in the North Bay area. It was not until the 1975 CLRAO negotiated agreement that the recognition provision was strengthened and the union could assert bargaining rights in the North Bay area.

66. In this regard counsel noted that Steds was not signatory to or otherwise bound to the North Bay local area agreement. As Local 493's bargaining rights did not extend to the North Bay area it could hardly be faulted for any failure to enforce a collective agreement on Steds non-union projects in that area. As its bargaining rights were limited to Timmins and Sudbury, and because Steds did not perform any work in those areas after the Timmins Allied Chemical project which prompted the 1965 agreement, it cannot be said that Local 493 abandoned its bargaining rights for either geographic area. It had no opportunity to enforce collective agreement obligations because Steds did not work in those areas. Neither was there a need to re-negotiate the collective agreements.

67. Counsel argued that throughout the union's bargaining rights with respect to Steds were being actively exercised and asserted through the negotiations of successive collective agreements by Local 493 with the SCA or the CLRAO. Local 493 may at various times may have been derelict in its enforcement or the administration of those collective agreements, but the fact that it continued to bargain for successive collective agreements to which it considered Steds bound is proof that it did not abandon, and did not intend to abandon bargaining rights. The lack of personal contact between the Local union and the contractor, or the poor enforcement of the collective agreement by a Local union is irrelevant in circumstances where bargaining takes place between the trade union and an employer's organization. In support of this "non-abandonment" argument counsel referred to *Newman Bros. Limited*, [1981] OLRB Rep. June 750; *Inducon Construction (Northern) Inc.*, [1982] OLRB Rep. March 390; *Culliton Brothers Limited*, [1982] OLRB Rep. March 357; *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405; *Steelfabco Inc.*, [1990] OLRB Rep. Jan. 83.

68. Finally, even if Local 493 had through *its* conduct abandoned its bargaining rights there is no evidence that any of the other locals had done so prior to province-wide bargaining. As long as the trade union can point to one source of bargaining rights or one area of the province in which it maintained bargaining rights at the commencement of province-wide bargaining those bargaining rights feed the designation and fill any void left by the alleged abandonment of bargaining rights by Local 493.

69. The fourth and final line of bargaining rights asserted stem from the rights acquired by Local 607 through the signing of the working agreement by Charles Olmsted in June 1970, and the collective agreement signed by William Olmsted in October 1971. Counsel asserted that extrinsic evidence to vary the clear and unambiguous terms of those agreements or limit their application was inadmissible. As such any evidence that sought to show the agreements were intended to be site or job specific ought not to be considered.

70. Moreover, Steds reply to Local 493's application in September 1971 must be viewed as an acknowledgement of Local 607's bargaining rights. Counsel also pointed to Local 607's letter of February 16, 1978 as evidence that Local 607 asserted and intended to continue its bargaining rights. The lack of any evidence that Steds performed any work within Local 607's jurisdiction after the Kapuskasing job in 1970 negates any suggestion that Local 607 abandoned those rights.

The Employer's Position

71. Counsel for Steds submitted that the equitable doctrine of laches applied and/or that the grievance should be dismissed for reasons of delay (see *Ontario Hydro-Darlington G.S.* [1986] OLRB Rep. July 1014 and Brown and Beatty, *Canadian Labour Arbitration* at page 2-64.) Steds asserts that the evidence with respect to the bargaining rights of the various locals indicates that bargaining rights either never existed at all or alternatively were abandoned prior to province-wide bargaining.

72. It is not disputed that in order to succeed in this referral, Local 493 must establish that Steds is bound to the province-wide ICI collective agreement. Steds submits that it did not at any time become bound to that collective agreement because, at the time the Act extended bargaining rights province-wide, it was not bound to recognize the union in any part of the province. Steds submits that because of the inordinate delay of Local 493 it is not now in a position to prove that fact. Steds argues the delay has resulted in the absence of an important witness, the destruction of company records, and a general lessening of its ability to present its case and have a fair hearing. Similarly, the delay has impaired Steds' ability to prove that, if bargaining rights did exist, those bargaining rights had been abandoned.

73. Counsel focused upon the bargaining rights which Local 493 asserts were held by Local 607 at the commencement of province-wide bargaining to make his arguments with respect to laches and delay. It was conceded that if those bargaining rights existed when province-wide bargaining commenced in 1978, Steds became bound to the ICI province-wide agreement. Counsel argued however that because of the unreasonably delay on the part of Local 493 in filing this grievance, Steds was not in a position to fairly put forward all relevant evidence pertaining to the bargaining rights allegedly held by Local 607. The death of William Olmsted in 1987 and the loss or destruction of a number of company records with respect to the company's activities throughout the 1970's had prejudiced Steds in its defense of this grievance.

74. Counsel argued that there was no reasonable excuse for Local 493's delay. Counsel submitted that in his view Local 493 had delayed in asserting its bargaining rights since April 1971 when the Sudbury area collective agreement expired. In so doing he argued that the three collective agreements with Local 493 signed by Steds were not limited to the Timmins or Sudbury area but obliged Steds to recognize Local 493 throughout its territorial jurisdiction including the District of Nipissing. In the alternative, and at the very least Local 493 had delayed in asserting its rights without reasonable excuse since the commencement of province-wide bargaining.

75. Counsel referred to a number of factors as evidence of the prejudice caused to Steds by Local 493's delay. First was the vagueness of Mr. Charles Olmsted's evidence. He argued that it

was inequitable to require Mr. Olmsted to testify about events that occurred twenty years ago. His evidence about the representations made to him when he signed the working agreement with Local 607 was necessarily vague because of the passage of time. Had the union not delayed in filing the grievance and asserting its rights, Mr. Olmsted's evidence would not have suffered from fading memory. In any event, in light of Mr. Olmsted's evidence, and in the absence of any evidence from the union to the contrary, the working agreement signed by him was site specific and could not form the basis for a claim of existing bargaining rights with Local 607 at the time province-wide bargaining was introduced.

76. Counsel also submitted that the collective agreement signed by William Olmsted in October 1971 could not be relied upon. Given the remainder of the evidence the Board can't be assured that the signatories to that document intended the agreement to operate according to its strict terms.

77. Counsel pointed to a number of unexplained questions or issues surrounding the collective agreement with Local 607 signed by William Olmsted. In particular if the working agreement signed by Charles Olmsted was operative according to its strict terms the signing of the "standard" agreement by William Olmsted was completely redundant. Article 3 of the working agreement already bound Steds to that standard agreement. He noted the fact that at the time Steds was not performing any work within Local 607's area. Counsel cited the circumstances surrounding Local 493's application for certification and suggested that the signing of the collective agreement *may* have had some relation to that. Counsel argued that these factors should cause the Board concerns that would not be present if the people actually involved in negotiating the agreement had testified. Local 493's delay in asserting bargaining rights or filing this grievance has made that impossible.

78. Counsel referred to a number of other contradictions or inconsistencies in the documentary and *viva voce* evidence. He argued that these raised considerable doubt that a decision based on sketchy, incomplete evidence some twenty years after the fact and without the *viva voce* evidence from the persons involved with the various events would be a fair one. He argued that every person who testified suffered from fading memory and of necessity could offer only sketchy evidence in key areas.

79. As an alternative argument counsel submitted that if the grievance was not dismissed by reasons of delay or laches, it ought to be dismissed as Local 493 had abandoned any bargaining rights prior to the advent of province-wide collective bargaining. He argued that the three agreements with Local 493 signed by Steds were not restricted to the Timmins area and the Sudbury area but obliged Steds to recognize Local 493 throughout the area over which it had jurisdiction including the District of Nipissing where Steds performed most of its work. Counsel asserts there is a distinction between the "recognition" given to Local 493 in those agreements, and the geographic "area" to which the terms and conditions of the particular agreement applied.

80. Counsel for Steds took the position, *inter alia*, that as these collective agreements obliged Steds to recognize Local 493 throughout its geographic jurisdiction, including the District of Nipissing, Local 493's failure to enforce the collective agreement either before or after province-wide bargaining constituted abandonment. In response to the assertion that Local 493 only had Timmins area and Sudbury area bargaining rights, counsel queried why Local 493 would enter into collective agreements with a North Bay contractor which did *not* cover North Bay where the contractor usually worked, but *did* cover a portion of the geographic area over which Local 493 had jurisdiction where the contractor performed little work. He submitted that the collective agreements between Steds and Local 493 were intended to and did cover the North Bay area because

Local 493 would not want Steds to operate “non-union” in North Bay (where it did most of its work) but “union” in Timmins and Sudbury (where it rarely worked.)

81. Counsel for Steds asserted that Steds was not bound to any SCA of CLRAO negotiated collective agreement. Section 52 of the Act did not apply as Steds was never a member of either organization. There was no evidence that Steds had ever given the organization authority to negotiate on its behalf. Neither was there evidence of ostensible authority. Steds name on various lists not prepared by Steds and of which it was unaware could not be a representation by Steds that the SCA had authority to act on its behalf. Neither could William Olmsted’s letter be viewed as giving the SCA any authority.

82. Finally, counsel referred to the Board’s decision in *Marineland, supra*, in support of his argument that evidence after the commencement of province-wide bargaining was corroborative of the state of affairs that existed at the time province-wide bargaining was introduced. In this instance that evidence corroborated that the trade union had abandoned its bargaining rights prior to province-wide bargaining.

The Union’s Reply

83. In response to the employer’s arguments with respect to delay and laches, counsel argued that the prerequisites of the application of such principle were not present in this case. He referred to *Re Parking Authority of Toronto*, [1974] 5 L.A.C. (2d) 150. Counsel argued that in this case there had not been any knowing acquiescence on the part of Local 493. In addition, there was no evidence of detriment to Steds or a change in position by Steds as a result of the union’s conduct. Rather, Steds has had the advantage of conducting its business on a non-union basis in violation of its contractual obligations for many years (*KNK Limited, Agincourt Electric*, [1991] OLRB Rep. Feb. 209). He submitted that to the extent that Steds has suffered any present detriment that matter can be considered in determining the remedy which flows from the violation of the collective agreement.

Decision

84. The principles of abandonment, laches and/or delay are separate and distinct, yet, in the circumstances of this case, they are somewhat intertwined and closely connected. In my view, the inordinate delay of Local 493 in asserting bargaining rights has prejudiced Steds. It has not, however prejudiced it to the extent asserted by Steds.

85. I find that Steds did not at any time become bound to any collective agreement negotiated by either the SCA or the CLRAO on behalf of the SCA.

86. Steds was never a member of the SCA. Moreover, the evidence does not establish that Steds ever authorized the SCA to bargain on its behalf. Although the union could perhaps originally point to Steds’ name on the various lists which it has received to support its position, in the circumstances of this case I find that the *viva voce* evidence of Charles Olmsted is sufficient to shift an evidentiary burden of proof to the union. In light of Mr. Charles Olmsted’s testimony, and in the absence of reliable and direct evidence from representatives of either the union or the SCA with respect to such matters as the notation “Okay, SCA” or “the telecon” between Mr. Ross and William Olmsted or the compilation of the lists, I am not prepared to find that Steds became bound to various collective agreements negotiated by the SCA as asserted by Local 493.

87. In the circumstances, I do not view William Olmsted’s letter of March 30, 1971 as giving either actual or ostensible authorization to the SCA. The March 30th, 1971 letter is equivocal. In

the absence of any evidence from Mr. Ross about the “telecon”, I find the letter is no more than an agreement to apply the terms and conditions of the collective agreement between Local 493 and the SCA *if* Steds engaged in construction activities in Sudbury. The term “pick-up” is not synonymous with any words which indicate authorization.

88. The letter must be assessed in context and with due regard to the surrounding circumstances and the correspondence which preceded it. That evidence discloses that at the time Local 493 continued to require at least some individual contractors including Steds to sign collective agreements with the Local. That action in itself is contrary to a conclusion that the SCA had authority to bind Steds to agreements signed by the SCA. In addition, the original correspondence which requested that Steds negotiate a collective agreement and the act of sending Steds a collective agreement “Identical to what has been signed” with the SCA for signature are both inconsistent with the assertion that Steds was automatically bound to the SCA negotiated collective agreements. These actions also do not establish any representation by Steds that the SCA was acting as Steds’ agent in negotiations with the union.

89. Section 52 and the cases referred to by counsel for the Labourers do not apply. All of the cases cited by counsel for the union were properly and readily distinguished by counsel for Steds. Each of those cases involve situations in which the contractor either was or became a member of the employer’s organization, or where the contractor had represented that the employer’s organization had either actual or ostensible authority to act on its behalf. That is not the case here.

90. Section 52(1) specifies that a collective agreement between an employer’s organization and a trade union is “... binding upon the employer’s organization and each person who was a member of the employer’s organization at the time the agreement was entered into *and* on whose behalf the employer’s organization bargained ...”. If the employer’s organization doesn’t deliver a list, it is deemed to bargain on behalf of all of its members provided the trade union holds bargaining rights with respect to employees of that member. On the other hand, if the employer’s organization does deliver a list which does not list all of its members for whom the trade union holds bargaining rights the employer’s organization bargains only on behalf of the members on the list. For its part the trade union continues to be able to negotiate directly with member contractors not on the list. In those instances, the employer’s organization has indicated that such contractor member is not one “on whose behalf it is bargaining”. If the employer’s organization delivers a list of *members* and includes on that list an employer for whom the trade union does not then hold bargaining rights, the organization can extend voluntary recognition to the union on behalf of its employer members (see for example, *David Yan Construction, supra*).

91. The employer’s organization cannot, however, through the mere delivery of a list which may, through inadvertence, negligence or fraud contains the name of an employer who is *not* a member of the organization and on whose behalf it has *not* been authorized to bargain, voluntarily recognize a trade union or in some other manner bind such non-member employer. The trade union generally obtains rights either through the certification proceedings under the *Labour Relations Act* or voluntary recognition by an employer. A trade union cannot obtain rights with respect to an employer as a result of the unauthorized conduct of a third party. To hold otherwise would be inconsistent with the provision found in section 52(1) that the employer’s organization can bind its members *and* those employers “on whose behalf” the employer’s organization bargains.

92. The next issue therefore is whether and to what extent any of the Locals held or obtained bargaining rights outside the scope of the SCA negotiated collective agreements. That necessarily involves a determination with respect to the various agreements signed by either

Charles or William Olmsted, and the arguments with respect to laches, delay and abandonment as they relate to those agreements.

93. I find that the three collective agreements signed by Steds with Local 493 are ambiguous on their face. Having regard to the entirety of those collective agreements, I find some merit in counsel for Steds' submission that there may be a difference between the recognition given to Local 493 under those agreements and the geographic scope of the collective agreement. The foremost ambiguities appearing on the face of these documents are the difference, if any, between the "recognition" and "area of agreement" provisions, the lack of any reference to the local union in Article 4 of the 1965 Timmins area collective agreement, the use of the singular "project" in that same Article, the reference to "rates of wages and working conditions" in Articles 3 and 300 of the 1967 Timmins area and 1970 Sudbury area agreements as compared to a reference to "rates of pay, hours of work and other conditions of employment" in the "recognition" articles of those same collective agreements.

94. Moreover, the evidence with respect to surrounding events and circumstances does little to resolve the ambiguity and in fact adds to it. For example, why would Steds sign either the 1967 Timmins area or 1970 Sudbury area collective agreement when there is nothing which suggests the company was working in either of those areas at the time? If the 1965 Timmins collective agreement did not extend to cover the Sudbury area, why would Steds enter into the Sudbury area collective agreement when there is nothing to indicate that the union held bargaining rights in that area prior to 1970 and Steds was not working in the area at the time? Why would Local 493 in September 1971 apply to be certified for the Timmins area when it now asserts it held bargaining rights for that area at the time? Why would either party enter into agreements covering a limited portion of the area over which Local 493 had geographic jurisdiction in which Steds performed very little work, while ignoring that area where Steds carried out most of its activities? As I have found that the union was or should have been aware of Steds non-union activities, why was there no assertion of rights or enforcement of collective agreement obligations at least since 1973 when, according to Mr. Ross' own evidence, the collective agreement to which the union considered Steds bound covered the District of Nipissing where Steds was openly carrying out its numerous construction activities?

95. These ambiguities in the collective agreement and the evidence which has been led by both parties make it abundantly clear that extrinsic evidence from those directly involved in the various events and circumstances and the negotiation and execution of the collective agreements is required in order to properly and fairly adjudicate this matter. The passage of time and the inordinate delay of Local 493 in asserting bargaining rights however has made the presentation of that evidence impossible. Reliable, cogent evidence with respect to these matters is no longer possible due to the death of Mr. William Olmsted, a key witness, the destruction of company records in the normal course of business, and the general difficulties experienced by all witnesses required to testify about events twenty years past. Had these three collective agreements had been the only source upon which the Labourers based their claim that bargaining rights existed at the time of the commencement of province-wide bargaining, I would have dismissed this grievance by reason of delay. The passage of time and the intervening events have, in the circumstances of this case prejudiced Steds in its defence of the grievance.

96. The three collective agreements with Local 493, however, are not the only source of bargaining rights. There also exists the working agreement with Local 607 signed by Charles Olmsted and the collective agreement with Local 607 signed by William Olmsted. In the circumstances, those agreements are an independent, distinct source of bargaining rights upon which Local 493 can base its claim that Steds is now bound to the province-wide collective agreement.

97. In light of the agreement signed by William Olmsted in October 1971 I find it unnecessary to address the various issues and arguments raised with respect to the working agreement signed by Charles Olmsted. Similarly, I do not consider the Reply filed by William Olmsted in reply to Local 493's application for certification (and prior to his signing of the collective agreement with Local 607) to be of much assistance.

98. Steds has argued that because of Local 493's delay in asserting bargaining rights, it has suffered prejudice with respect to the presentation of its evidence regarding Local 607's bargaining rights or its agreement with Local 607. It refers in particular to the death of William Olmsted, who could or would testify with respect to the circumstances surrounding the execution of the October 1971 collective agreement.

99. In the circumstances, I find that Steds has not suffered the prejudice it asserts as a result of Local 493's delay. I have made that determination because the collective agreement signed by William Olmsted is clear and unambiguous. On balance I find that there is neither latent nor patent ambiguity. There is no issue, for example, with respect to recognition of Local 607 or the scope of the agreement. The collective agreement was signed by the person who was at the time President of the company. In these circumstances, extrinsic evidence, even if it were available, would not be admissible.

100. In essence, Steds' submissions with respect to delay and laches is that the Board cannot rely upon the document or assume that the parties intended the document to operate strictly and according to its clear and unambiguous terms. Counsel argues that there is a distinct possibility that had William Olmsted been alive to testify, Steds could have presented evidence to prove the agreement was not operative according to its terms. In support, counsel refers to the ambiguities and inconsistencies in other documents as well as Mr. Charles Olmsted's evidence that the working agreement he signed was intended to be a site specific agreement. He argues similar evidence might have been forthcoming from William Olmsted had he been alive to testify.

101. Notwithstanding counsel's able argument, I do not agree. In the face of the clear and unambiguous terms of the collective agreement signed by a duly authorized representative of the employer, the Board cannot simply assume that the evidence of William Olmsted is either necessary, relevant or admissible. To tread down the path which counsel for Steds urges upon the Board in this instance would undermine the certainty of written agreements entered into by duly authorized representatives of parties. If the argument were accepted, contracting parties could no longer simply rely upon documents executed years ago unless the signatories to the agreement were available to testify that the document truly means and was intended to mean what it says.

102. A board of arbitration cannot simply admit extrinsic *viva voce* evidence which seeks to contradict, vary or add to the written terms of a collective agreement. The parties' intentions must be ascertained from the written words they have used. In addition, boards of arbitration don't generally inquire into the reasons why a collective agreement was signed. It is only in cases where the language of the agreement is ambiguous (patently or latently) that extrinsic evidence is admissible. Evidence of statements or conduct during negotiations or at the time of signing the agreement is not generally admissible. If such evidence is not admissible in any event, Steds cannot be prejudiced by its inability at this stage to call the evidence. In my view Steds' arguments with respect to delay and prejudice in the presentation of its case do not apply to the issue as to whether Local 607 acquired and held bargaining rights.

103. There remains the issue of abandonment. Was there an abandonment of bargaining rights by Local 607 prior to province-wide bargaining?

104. The law with respect to abandonment is well settled and need not be detailed here. A clear and concise synopsis of the law can be found in the Board's decision in *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523, where at page 527, the Board stated:

13. It was not disputed that the question of abandonment is a matter of fact to be resolved by the Board in the circumstances of each case: *J.S. Mechanical*, *supra*; *Inducon Construction (Northern) Inc.*, *supra*; *John Entwistle Construction Limited*, *supra*; *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) et al*, *Re Labourers' International Union of North America*, *Local 527 et al.* and *John Entwistle Construction Ltd. et al.*, *supra*; *Twin City Plumbing and Heating*, [1982] OLRB Rep. Apr. 631. In making that determination, the Board evaluates the conduct of the union in the context of the duration of the period of inactivity, whether the employer continued to operate in the area, whether the terms and conditions of employment have been changed by the employer without objection from the union, whether the union has sought to negotiate or administer existing collective agreements and any extenuating circumstances which might account for an apparent failure to assert bargaining rights. For example, as a general rule, the Board has regard to a second automatic renewal of a collective agreement but thereafter the onus is on the union to satisfy the Board that its bargaining rights have not been abandoned by showing its interest in maintaining those rights through contact with the employer party to the agreement: *The Belleville and District Builders' Exchange*, *supra*; *Cooksville Steel Limited*, *supra*; *Pinkerton's of Canada Limited*, *supra*. Absent evidence the union actively pursued is bargaining rights, the Board has held the union has "slept on those rights" and must be taken to have abandoned those rights: *Elgin Construction*, *supra*; *Mattagami Construction*, *supra*; *Catalytic Enterprises*, *supra*; *John Entwistle Construction Limited*, *supra*; *York Finch General Hospital*, *supra*. The Board's jurisprudence also accepts the notion that a union is not expected to seek actively to pursue its bargaining rights during periods when the employer ceased operating within the geographic scope of the collective agreement (see *Able Construction (Kitchener)*, *supra*; *Inducon Construction (Northern) Inc.*, *supra*) particularly where the union did seek to assert those rights at the first opportunity upon the employer's return to the area: *John Miller & Sons Ltd.*, *supra*.

105. The facts in this case do not support a finding of abandonment by Local 607. Steds did not ever again operate in Local 607's area after the signing of the collective agreement in 1971. As such, Local 607 did not have an opportunity to assert collective agreement obligations. Nor was it required to engage in collective bargaining to renew a collective agreement for non-existent employees. There is no evidence from which it can be inferred that Local 607 was not interested in maintaining its bargaining rights.

106. I find therefore that Local 607's bargaining rights continued to exist when province-wide bargaining was introduced. Local 607 had not abandoned those bargaining rights and the conduct of the other locals (and in particular Local 493) which failed to assert bargaining rights although provided with ample opportunity to do so cannot be held against Local 607. Local 607 cannot be held accountable under the abandonment concept for the inactivity of the other Locals. By operation of statute, Local 607's bargaining rights were extended to the other Locals, including Local 493. Steds became bound to the province-wide collective agreement and continued to be bound to that ICI province-wide collective agreement at the time the grievance was filed.

107. Although Steds is bound to the collective agreement, that is not the end of the matter. There remains to consider the conduct of Local 493 and its delay in asserting its bargaining rights. That delay issue is separate and distinct from Steds' arguments that the delay has prejudiced it in presenting evidence that none of the locals held bargaining rights.

108. For many years Local 493 has failed to enforce its bargaining rights. By its conduct Local 493 has lulled Steds into believing certain facts, namely that it was not bound to recognize the union or work pursuant to the terms of the province-wide ICI collective agreement. On the basis of this representation by conduct, Steds developed its business. Contracts were bid and obtained, work was commenced and completed, relationships were established and terminated

with employees and sub-contractors alike, while Local 493 stood by and did nothing. Relying as it did on the union's inactivity and non-assertion of either bargaining rights or a collective agreement, Steds has conducted and continues to conduct its business. In these circumstances, it would be most unfair and inequitable for Local 493 to now suddenly insist upon its strict legal rights. As a result of its conduct, I find that Local 493 is estopped in this grievance from asserting its rights pursuant to the terms of the ICI province-wide agreement. The grievance is therefore dismissed.

109. How long is Local 493 estopped from asserting rights under the province-wide agreement? The parties made brief submissions with respect to this issue. Counsel for Steds argued the estoppel is permanent. Over the course of the years Steds has developed its business in a particular fashion on the basis that it was not bound to recognize Local 493 and was not bound to the ICI province-wide agreement. He stated that decisions were made daily about the direction of the business on the basis of Steds' understanding that it was a non-union company. Those decisions are irreversible. Counsel argues in effect that the clock can't be turned back. In argument he submitted that Steds' business today would or could have been quite different if Local 493 had asserted its rights earlier. For example, Steds might not have concentrated its energies on its general contracting construction activities but might have developed its consulting engineers business instead. No evidence was led to support those submissions.

110. Counsel for the union on the other hand submitted that if Local 493 is estopped from asserting its bargaining rights, it is estopped only until the time Local 493 gave notice to Steds that it was reverting to its strict legal position and its strict legal rights. That notice came with the filing of this grievance. Thereafter Steds was aware of Local 493's assertion of bargaining rights. Alternatively, counsel argues the estoppel runs until the end of the agreement under which the grievance was filed (1988-90 collective agreement).

111. Normally a board of arbitration in adjudicating upon a grievance in which an estoppel argument is raised will go on to determine the length of that estoppel. Strictly speaking such a determination is mere obiter and unnecessary to dispose of the particular grievance before the arbitration board. Arbitrators deal with the issue however largely to assist the parties in their future conduct and continued relations. The facts and circumstances here however are quite different from the "ordinary" or "normal" estoppel cases.

112. In the unique circumstances of this case the estoppel issue and the parties' positions with respect to the length of that estoppel are inextricably tied to issues revolving around the statutory scheme of province-wide bargaining in the ICI sector, and how that scheme of bargaining has affected the principles of abandonment. The scheme of province-wide bargaining and the concept of abandonment (or in this case a permanent estoppel) of statutorily granted bargaining rights are not matters normally dealt with by arbitrators. In my view there are significant policy considerations raised by the positions of these parties when the estoppel issue is viewed against the background of province-wide bargaining. For example can or should there be an estoppel of Local 493's rights beyond this grievance when those rights exist and will continue to exist by reason of the statutory scheme and irrespective of Local 493's past conduct? Is it appropriate to rely upon "traditional" estoppel cases which determine that an estoppel may run until the expiry of a collective agreement when the parties can re-negotiate the agreement in this particular situation where the parties to the grievance are not, strictly speaking the parties that negotiate the agreement? In the circumstances was Steds required to change its practices or alter the manner in which it conducted its business merely because it received notice of the grievance? How does the conduct of one local affect the rights of the other locals also bound to the province-wide agreement?

113. In a referral of a grievance under section 126 of the Act, the Board generally acts as a

traditional board of arbitration. Empowered under the Act to hear and determine grievances in the construction industry the Board should not lose sight however of the fact that it is also an administrative tribunal established by statute to interpret, administer and enforce the Act. In exercising its jurisdiction matters are normally heard by a tripartite board consisting of a neutral vice-chair and Board members representing labour and management. These Board members have special expertise in labour relations matters and provide valuable insight and perspective in all areas including, various policy considerations which impact upon the Board's deliberations.

114. The issue with respect to the length of the estoppel raises the type of policy considerations which in my view are more appropriately dealt with by a tripartite Board.

115. In light of the policy considerations and implications I have determined not to render a decision which deals with the length of the estoppel. Rather I have adjudicated only the specific grievance referred to the Board and which because of the circumstances the parties agreed could be decided by a single vice-chair. Perhaps the parties can resolve the length of the estoppel issue as between themselves. If they are unable to do so, the issue will inevitably be raised again in any future litigation between them. At that time a tripartite Board can address the many policy considerations which surround the estoppel issues having had the benefit of hearing all relevant evidence on the issue and the full and complete submissions of the parties with respect to that evidence.

116. In the result therefore, although I have determined that Steds is bound to the province-wide ICI collective agreement, the grievance referred to the Board on November 8, 1989 is dismissed.

2662-90-OH Ronald Gerald Tisler, Complainant v. The Township of Matchedash Council, Respondent

Discharge - Health and Safety - Deputy fire chief of volunteer fire department alleging that he was removed from his position for acting in compliance with, and seeking enforcement of, *Occupational Health and Safety Act* - Board determining that town council not motivated by anti-safety animus - Complaint dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *R. W. Pirrie* and *K. Davies*.

APPEARANCES: *Ronald Gerald Tisler* appearing on his own behalf; *Milton Zwicker* for the respondent.

DECISION OF THE BOARD; January 27, 1992

1. We have received a letter from counsel for the respondent requesting that the Board provide "a written copy of the Board's reasons for its decision dated December 18, 1991". The following were the oral reasons rendered at the conclusion of the hearing into this matter on December 18, 1991:

This complaint has been filed pursuant to section 24 of the *Occupational Health and Safety Act*. The complainant Mr. Tisler was, until September 28, 1990 the deputy fire chief of the Township of Matchedash Volunteer Fire Department. This is a volunteer position for which Mr. Tisler received what can only be characterized as token remuneration. In 1989 the total amount of

money received by Mr. Tisler for performing voluntary services for the fire department amounted to less than \$250.00.

Mr. Tisler alleges that he was removed from his position as deputy fire chief because he acted in compliance with the *Occupational Health and Safety Act* ("the Act") or the Regulations to the Act and has sought the enforcement of the Act and its regulations.

The respondent Township of Matchedash denies the allegations and asserts that Mr. Tisler was removed from his volunteer position because he was incompetent, insubordinate and undermined the authority of the system.

We heard the evidence of six witnesses over the course of eleven days of hearing. In addition, certain facts and evidence were agreed upon by the parties. We also had voluminous documentary material tendered as evidence. That evidence spanned a period in excess of eight years. We note at the outset that at the end of the day much of the evidence was irrelevant to the central issue in dispute, namely the cause or motive underlying Mr. Tisler's removal from office.

In our view the calling of, or responding to this evidence had more to do with what we will loosely term as the "politics" of the issues and the personalities of the key players than any real desire to focus on the substantive allegation that in the dismissal of Mr. Tisler the Township council was motivated by anti-safety animus.

In making our findings of fact we have considered the usual factors including the consistency of the witnesses' evidence, their demeanour while testifying, the ability of the witnesses to resist the influence of self-interest to modify his or her recollection of past events and what appears to be reasonably probable when all the evidence is assessed and weighed. Having regard to the evidence and those factors we have made the following conclusions and determinations.

We note at the outset that for purposes of our decision herein we will assume without finding that Mr. Tisler's position as deputy fire chief of the volunteer fire department is covered by the Act. We will assume without finding that the volunteer fire fighters fall within the definition of "worker" and have full recourse to all the rights and obligations extended to workers under the Act.

We note further that in our view section 99 of the *Municipal Act* has no application to these proceedings.

From an evidentiary point of view we find that over the years there has been an appalling lack of co-operation and communication between the council and the volunteer fire department. Set in their own ways members of both the council and the fire department blame the other for this state of affairs.

In our view council has not always reacted promptly or properly and in a more sensitive manner to issues of health and safety raised by the fire department volunteers. Members of council must realize and recognize that the Act imposes joint and mutual obligations upon employers and employees alike.

It is the responsibility and obligation of the fire fighters to bring forth to council matters relating to health and safety. Raising such health and safety concerns should not be viewed as a challenge to council's authority. Neither is it always an appropriate response to say that as elected representatives the council is politically responsible for allocating its very limited funds in a manner they deem best or as they see fit.

On the other hand Mr. Tisler's characterization that council is unconcerned about matters of safety is incorrect and not borne out by the evidence. We do not accept Mr. Tisler's characterization of council's conduct. Rather we find that Mr. Tisler's perception and judgement in matters concerning his relationship with council are clouded by his conviction that only he knows the applicable legislation, the obligations and liabilities of all the parties, and consequently that only he knows the appropriate way of dealing with health and safety issues. Having focused his mind upon health and safety, and having decided upon the righteousness of his cause Mr. Tisler

has proceeded in a manner which excludes any other considerations, other alternatives or other solutions. In this lies the crux of the issue before us.

We find that Mr. Tisler is a dedicated volunteer fire fighter who honestly and truly desired to bring about changes which in his view would strengthen the Matchedash volunteer fire department and ultimately thereby provide better fire fighter services and fire protection to the residents of the Township.

We further find that Mr. Tisler has tried to do his best as a volunteer deputy fire chief. On his own he took various courses at the fire college to enable him to perform his duties and responsibilities to the best of his skill and ability. He also sought in various ways to become more familiar with all relevant legislation including the *Occupational Health and Safety Act*.

Notwithstanding these extraordinary efforts, (extraordinary particularly when the volunteer nature of the position is considered) we have concluded that Mr. Tisler was not well suited to the position of deputy fire chief of the volunteer fire department at the Township of Matchedash. We have arrived at this conclusion because although Mr. Tisler is knowledgeable about a vast array of matters which impact upon the position of deputy fire chief, Mr. Tisler is also narrow minded, argumentative, and confrontational. It was this attitude which caused his dismissal.

Having regard to the entirety of the evidence we find that Mr. Tisler was not dismissed from his position because he acted in compliance with the Act or Regulations, or sought the enforcement of the Act or Regulations.

Reeve Gillies in words far less complimentary referred to Mr. Tisler as a troublemaker. Council viewed Mr. Tisler's conduct throughout as a mere desire to aggravate or goad. It was their perception that Mr. Tisler was the root of the problems between council and the fire department. In their view if Mr. Tisler was removed from his position the relationship, co-operation and communication between council and the fire department would improve. We need not necessarily determine the merit of that view point. There is no doubt that it was a genuinely held view point. For our purposes it is sufficient to note that this was the underlying motive for Mr. Tisler's dismissal.

Quite simply council seized upon the first available, somewhat legitimate opportunity offered by Mr. Tisler, that of "undermining the system" to rid itself of a burden. In so doing, council was not at all motivated by anti-safety animus. They did not seek to dismiss Mr. Tisler *because* he raised safety concerns or safety issues. Rather they dismissed him because in their view he was a confrontational, disruptive volunteer whose attitude was a liability not an asset to the relationship between council and the fire department.

In the end we find that there was no breach of section 24(1) of the Act and we dismiss the complaint.

2. Although not set out in our oral reasons given at the conclusion of the hearing, the Board did not consider it appropriate to apply the discretionary provisions found in section 24(7) to the facts and circumstances of this case.
-

0066-90-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, Applicant v. **Turn-Key Installations Inc.**, Respondent v. Group of Employees, Objectors

Bargaining Rights - Bargaining Unit - Certification - Construction Industry - Natural Justice - Reconsideration - Employer submitting that Board's decision in *O.J. Pipelines* incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed

BEFORE: *N. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *N. Wilson*.

APPEARANCES: *A. J. Ahee*, for the applicant; *Robert MacDermid*, for the respondent; *Michael Horan* and *Shawn Johnston*, for the objectors.

DECISION OF THE BOARD; January 7, 1992

1. The respondent and a group of employees of the respondent have requested, pursuant to section 106(1) of the *Labour Relations Act*, reconsideration of the Board's decision in this application for certification. The Board had disposed of the application for certification without a hearing in accordance with its discretion under section 102(14) of the Act. The respondent had filed a reply opposing the application, but on grounds unrelated to those on which it has based its application for reconsideration. The Board found that the grounds on which the respondent was opposing the application for certification did not require a hearing and were not a bar to the Board disposing of the application. The reply did not take issue with the bargaining unit proposed by the applicant. The respondent also filed a list of its employees who were employed in the unit on the date of making of the application. There were two names on it.

2. A hearing was scheduled, however, for the purpose of receiving the evidence and representations of the parties respecting whether the Board should reconsider and vary or revoke its decision. The Board panel was constituted of *N. B. Satterfield*, *W. E. Gibson* and *N. Wilson*. The parties agreed at the hearing that they should make written submissions on the evidence heard by the Board. Board Member *Gibson* died subsequent to the hearing. The parties agreed ultimately that another Board Member should be substituted for *Mr. Gibson*. Accordingly, *D. A. MacDonald* was substituted. The parties agreed also that the facts for purposes of dealing with the requests for reconsideration were those set out in the respondent's submissions. Those facts are found at paragraphs 3 through 24 of the respondent's submissions. The Board's conclusions of fact and law set out below have been made having regard for the facts as agreed by the parties and their submissions thereon.

3. The applicant trade union is an affiliated bargaining agent of a designated employee bargaining agency. The employee bargaining agency, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States & Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, was designated by the Minister, pursuant to section 139(1) of the *Labour Relations Act*, to represent in bargaining in the indus-

trial, commercial and institutional (“ICI”) sector of the construction industry “all Journeymen and Apprentice Plumbers and Pipefitters” represented by affiliated bargaining agents of the designated employee bargaining agency.

4. The applicant was certified pursuant to section 144(2) of the *Act* for a bargaining unit described as:

“... all plumbers, plumbers’ apprentices, steam fitters and steam fitters’ apprentices in the employ of the Respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in Prince Edward County, the geographical townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the county of Hastings and the geographical townships of Percy and Cramahe and all lands east thereof in the county of Northumberland, save and except non-working foremen and persons above the rank of non-working foremen.”

Section 144(2) provides for two certificates to be issued. One was issued to the applicant on its own behalf and on behalf of all other affiliated bargaining agents of the designated employee bargaining agency in paragraph 3. In accordance with the provisions of subsection 144(2), it was confined to the ICI sector of the construction industry. A second one was issued to the applicant for the same trades in all other sectors of the construction industry in the geographic area described above.

5. The Board has previously determined that the labels “pipefitter” used in the designation orders and “steamfitter” used in the Board’s bargaining unit description are synonymous for the purposes of the *Labour Relations Act* (*D.E. Witmer Plumbing and Heating Ltd.* [1987] OLRB Rep. Oct. 1228.)

6. Pursuant to section 145(4) of the *Labour Relations Act*, when the applicant was certified in the ICI sector, the provincial collective agreement between the Ontario Pipe Trades Council and the Mechanical Contractors Association (“the Agreement”) became binding on the respondent in the ICI sector to the extent that the Agreement is a provincial agreement as defined in section 137(1)(e) of the act. The Mechanical Contractors Association is the employer bargaining agency designated to represent employers, including the respondent employer, for whose journeymen and apprentice plumbers and pipefitters the affiliated bargaining agents, including the applicant, of the designated employee bargaining agency referred to in paragraph 3 hold bargaining rights in the ICI sector.

7. Article 2.1 of the Agreement says:

“The Association agrees to recognize the Council as the sole collective bargaining agent for all employees of the contractors as defined in Definition 1.8.”

Definition 1.8 defines “employees” as follows:

“1.8 ‘Employee’ means a qualified and/or certified Journeyman or Apprentice employed by a Contractor as a plumber, steamfitter, pipefitter, welder and apprentice thereof, or job foreman.”

[emphasis added]

8. The applications for reconsideration arose out of the fact that, while the certificate confined to the ICI sector was for journeymen and apprentice plumbers and steamfitters, the applicant filed a grievance shortly after the certificate was issued alleging that certain welders employed by the respondent were performing work covered by the Agreement and employed contrary to it.

9. Regulations 52 and 59 under the *Apprenticeship and Tradesmen’s Qualification Act*,

R.S.O. 1980, c.24 as am. designate the trades of “plumber” and “steamfitter” as certified trades for the purposes of that Act.

10. Prior to 1988 it was common for the applicant or its related affiliated bargaining agents to request a clarity note in a certification decision to the effect that welders working in the plumbing and steamfitting trade were to be included in the bargaining unit. However, in *O.J. Pipelines Incorporated*, [1989] OLRB Rep. Sept. 976 the Board decided that such a clarity note was unnecessary insofar as it related to welders who were also either journeymen or apprentice plumbers or steamfitters. Welders who were also either journeymen or apprentice plumbers or steamfitters would be included already in the bargaining unit.

11. The Board in *O.J. Pipelines, supra*, decided as well that the clarity note was not appropriate insofar as it related to other welders working in the plumbing or steamfitting trades since those welders are not properly included as employees in the bargaining unit. At page 977 it stated:

“7. The designation orders issued pursuant to section 139(1) of the Act describe the provincial units of employees for the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades, and designate, for each such provincial bargaining unit, an employer and an employee bargaining agency. In effect, such designation orders designate the trades which ‘belong’ to each employee bargaining agency and its affiliated bargaining agents for purposes of the province-wide collective bargaining scheme. In the result, employee bargaining agencies and their affiliated bargaining agents can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (*Ninco Construction Ltd.*, *supra*; *Manacon Construction Limited*, *supra*; *Superior Plumbing & Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228; *Ellis-Don Limited*, *supra*; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Indeed, the structure of the Act requires an affiliated bargaining agent to seek bargaining rights for all employees in the trade(s) which its employee bargaining agency has been designated to represent in bargaining in the ICI sector (in the pertinent designation order) when making an application for certification which relates to that sector (*Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924; *Kraft Construction Company (1978) Ltd.*, [1989] OLRB Rep. Feb. 169; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe a bargaining unit which relates to the ICI sector in a manner which is inconsistent with the applicable designation order. To accommodate the designation system, and recognizing that trade union representation in the construction industry has historically been along trade lines, the Board’s practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade and to use the words of the applicable designation order.”

12. Those welders are also not properly included in the bargaining unit if they are not qualified under the *Apprenticeship and Tradesmen’s Qualification Act* to be working in the plumbing or steamfitting trades. The Board recognized in *O.J. Pipelines, supra* that welding has not been recognized as a separate trade either under the *Apprenticeship and Tradesmen’s Qualification Act* or by the Board, and that neither welding nor welders have been the subject of a designation order under section 139(1) of the Act. If the work that was being performed by welders at the date of an application for certification was, however, work within the plumbing or steamfitting trade then, pursuant to section 11 of the *Apprenticeship and Tradesmen’s Qualification Act*, those welders must hold a subsisting certificate of qualification or its equivalent in one of those certified trades or be an apprentice in one of those certified trades:

11.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or

a person referred to in subsection (4), shall work or be employed in a certified trade unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any persons, other than an apprentice or a persons of a class that is exempt from this section or a person referred to in subsection (4), in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a persons who is working in the trade at the time that it is certified shall be allowed a period of two years from the first day of the month following the month in which the trade is certified to qualify for a certificate of qualification in the trade, if he,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfies the Director that he is qualified to work in the trade and meets such other requirements as the Director may prescribe.

13. Although the Ontario Labour Relations Board is not responsible for the enforcement of the requirements of the *Apprenticeship and Tradesmen's Qualification Act*, it is a law of general application. As the Board observed in *E.S. Fox Limited*, [1989] OLRB Rep. July 738, at paragraph 13, its decisions should not be "... inconsistent with laws of general application which are specifically directed at matters with which the Board must be concerned in the course of exercising its powers or performing its duties under the *Labour Relations Act*...". Therefore, where the Board has described an appropriate bargaining unit so as to be confined to a specific, *certified* trade or trades, as it did in this application, the need to be consistent with the *Apprenticeship and Trademens Qualification Act* bears on the way the Board discharges its mandate under section 7(1) of the Act to "...ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103 (2) (j)". The Board does not include in the "count" of employees in the unit any employees who are performing work of the certified trade but are not qualified pursuant to the requirements of the *Apprenticeship and Tradesmen's Qualification Act* to work in that trade.

14. With that background, the Board turns now to consider the applications for reconsideration, beginning with the respondent's application.

15. The respondent advances two grounds as cause for the Board to reconsider its decision. First, counsel submits that the Board has made a fundamental error in the application of section 144(1) of the Act by interpreting its requirement that the bargaining unit "...shall include all employees who would be bound by a provincial agreement..." by reference to the designation orders instead of by reference to the bargaining unit set out in the Agreement as described above at paragraphs 6 and 7. Second, by focusing on the designation orders in applying this section, the Board has denied the respondent and its employees who would be bound by the Agreement notice of the impact and legal significance of the application and, therefore, has denied the respondent and its employees their fundamental rights to natural justice.

16. With respect to first ground, the respondent submits that the Board's decision in *O.J. Pipelines, supra*, is incorrect. The respondent submits that, "there is nothing in section 144 that refers to the designations issued by the Minister under section 139 of the Act." Rather, the respondent submits, section 144(1) specifically refers to the bargaining unit as set out in the provincial ICI agreement. The respondent continues by saying that while the designations issued under section

139 of the Act are the legal basis for the authority of the employer bargaining agency and the employee bargaining agency to bargain on behalf of their members, the employer bargaining agency and the employee bargaining agency are free to extend (in bargaining) the scope of the employee bargaining agency's bargaining rights so as to include welders and their apprentices and that the bargaining unit for which the applicant union applied for certification should have been described in terms which conformed with the unit described in the Agreement.

17. With respect to the second ground, counsel submits that the Board's exclusive jurisdiction under section 106(1) of the Act to determine all questions of fact or law that arise in any matter before it, gives the Board the exclusive jurisdiction to interpret section 144(1). Since the Board has a choice to interpret this section to find that the bargaining unit mandated by it is the one defined to conform with the designations or the one defined in the applicable provincial ICI agreement, the Board should be guided by the principles applicable to the interpretation of legislation as set forth by the House of Lords in *Shannon Realities, Limited and Ville Des St. Michel*, (1924) A.C. 185 pp. 192 and 193. Those principles, according to counsel, are that, where alternative constructions of the statute are equally open, the alternative which will be consistent with the smooth working of the system which the statute purports to be regulating is to be chosen over the one which will introduce "...uncertainty, friction or confusion into the system." Counsel asserts that the Board's interpretation of section 144(1) has introduced uncertainty, friction and confusion into the working of the province-wide bargaining scheme. That is because, by defining the bargaining unit to conform with the designation orders and not with the provincial ICI agreement, the Board has created a situation where: the union did not have to organize the respondent's welders but, after the certificate issued, the applicant claimed damages on the ground that the respondent's employment of welders breached the provincial ICI agreement to which the respondent became bound; the welders employed by the respondent felt that they were being forced to join the union to protect their jobs; they felt aggrieved because they were not given the opportunity to participate in the certification proceedings; and, they were not given any notice of the impact of the application. Respondent counsel submits, therefore, that the only way to interpret section 144(1) to achieve the smooth operation of the province-wide bargaining scheme which the Act purports to regulate, would be to determine the bargaining unit in this application in terms consistent with the provincial ICI agreement. Had that been done in this application, counsel argues, all of the employees affected by the application would have been given notice of it.

18. Finally, counsel submits that, were the Board to agree with him and reconsider its decision, the application would be dismissed because the applicant did not file membership evidence for welders and it is an agreed fact that there were at least three welders employed by the respondent on the application date who, on that date, were performing work which the applicant claims was work of the plumbing and steamfitting trades and covered by the Agreement.

19. Respondent counsel cites the case of *Gilbarco Canada Ltd.* [1971] OLRB March 155 for the proposition that the parties are free to amend, alter, extend or abridge the bargaining rights contained in a certificate issued by the Board. That case is not, however, a case involving employer bargaining agencies and employee bargaining agencies bargaining in the ICI sector of the construction industry for designated trades and therefore, is not helpful.

20. Counsel also relies on *United Brotherhood of Carpenters and Joiners of America* [1978] OLRB August 776 for the proposition that while the issue of the scope of the employee bargaining agency's bargaining rights cannot be bargained to impasse, the employer bargaining agency and the employee bargaining agency are free to extend the scope of the employee bargaining agency's bargaining rights. However, the issue in that case was whether the designated employee bargaining agency was failing to bargain in good faith when it sought to bargain to impasse a demand made on

the employer bargaining agency to extend geographically to all areas of the province the bargaining rights of affiliated bargaining agents which were limited at the time to local geographic areas. That decision does not stand for the proposition that employer bargaining agencies and employee bargaining agencies are free to extend their bargaining rights beyond their designated trades and that those extended rights then describe the appropriate bargaining unit for certification.

21. The Board is given broad discretion under section 6(1) of the *Labour Relations Act* to describe the appropriate bargaining unit in a certification application. That discretion is restricted, however, in construction industry certification applications. Sections 137 to 151 of the Act set out the statutory framework for province-wide bargaining in the ICI sector of the construction industry. This framework provides for single-trade, multi-employer bargaining through designated employer and employee bargaining agencies. Section 138 of the Act provides that where there is a conflict between any provision in sections 139 to 151 and any provision in sections 5 to 57 and 62 to 136 of the Act, the provisions in sections 139 to 151 prevail.

22. Section 146(1) of the Act mandates the provincial bargaining system in the ICI sector by requiring one collective agreement for each provincial unit. Section 146(2) of the Act prohibits any alternative arrangement:

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

23. Section 145(4) of the Act binds an affiliated bargaining agent which obtains bargaining rights for employees in the ICI sector and their employer to that provincial agreement made between the employee bargaining agency representing the affiliated bargaining agent and an employer bargaining agency:

145.-(4) After the 30th day of April, 1978 where an affiliated bargaining agent obtains bargaining rights through certification or voluntary recognition in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), the employer, the affiliated bargaining agent, and the employees for whom the affiliated bargaining agent has obtained bargaining rights are bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and an employer bargaining agency representing a provincial unit of employers in which the employer would have been included.

24. Section 144(1) of the *Labour Relations Act* states that:

(1) An application or certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for

such geographic area have already been acquired under subsection (3) or by voluntary recognition. (emphasis added)

25. Clauses (a), (b) and (c) of subsection 137(1) of the Act define “affiliated bargaining agent”, “bargaining” and “provincial agreement” respectively:

137.-(1) In this section and in sections 135 and 138 to 151,

- (a) “affiliated bargaining agent” means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency”;
- (b) “bargaining”, except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in clause 117 (e);
- ...
- (c) “provincial agreement” means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

26. Section 144(1) of the Act mandates that an affiliated bargaining agent applying for bargaining rights apply for a unit which includes “all employees who would be bound by a provincial agreement”. Respondent counsel has argued that, in this application, the Board must determine whom they would be by looking to the Agreement, and in particular clause 1.8 quoted above at paragraph 7. That clause defines employees for whom the applicant and other affiliated bargaining agents of the designated employee bargaining agency named in paragraph 3 hold bargaining rights in the ICI sector to include “welder and apprentice thereof”. While the Board agrees with counsel that, were the Board to describe the bargaining unit by reference to that definition, it would capture a welder who was not also “a qualified and/or certified Journeyman or Apprentice...plumber, steamfitter or pipefitter...”, with respect, the Board cannot agree that, for this application, the bargaining unit in the Agreement is the bargaining unit which, for purposes of section 144(1) of the Act, would “...include all employees who would be bound by a provincial agreement...”. Rather, the Board agrees with and adopts the conclusion reached by the Board in *Manacon Construction Limited*, [1983] OLRB Rep. March 407 at 424 that “...those employees represented by the trade union making application under [section 144(1)] ‘...who commonly bargain separately and apart from other employees...’ are the ones who would be covered by a provincial agreement”. The Board came to that conclusion at paragraph 35 from reading together the section 137(1) definitions of “affiliated bargaining agent” and “provincial agreement” in the context of section 144(1).

27. In that respect, the applicant satisfies the requirement of the statutory definition of affiliated bargaining agent to represent employees who commonly bargain separately and apart from other employees when it represents plumbers and steamfitters. The same cannot be said if it represents welders who are neither plumbers nor steamfitters. Welders who are not qualified or certified

journeymen and apprentices in a certified trade, do not commonly bargain separately and apart from other employees. Therefore, a unit described to include welders who are neither plumbers nor steamfitters would not satisfy the requirement of section 144(1) of the Act that "...the unit of employees shall include all employees who would be bound by a provincial agreement...". Furthermore, in order to determine who would be bound to the provincial agreement the Board must consider which employees the employee bargaining agency and its affiliated bargaining agents are *entitled* to represent. The designations issued by the Minister under section 139 are not only the legal basis for the authority of the employer bargaining agency and the employee bargaining agency to bargain, on the one hand, for certain employers and, on the other, for certain affiliated bargaining agents and employees, those designations also designate the specific trades or crafts that "belong" to specific bargaining agents and about which they are to bargain a provincial agreement. As the Board has previously stated in *Superior Plumbing & Heating Company Ltd.*, [1986] OLRB Rep. Nov. 1589 at paragraph 14, the statutory scheme of province-wide bargaining "...does compel the Board to find for purposes of province-wide bargaining in the ICI sector by the affiliated bargaining agents, that the only bargaining unit descriptions that are appropriate are referable to trades or crafts *covered by the applicable designation orders.*" [original emphasis].

28. In the alternative, if the Board's interpretation of section 144(1) is wrong, the Board would not define the appropriate bargaining unit by reference to the unit defined in the Agreement. In the Board's view, defining the unit in this application in terms consistent with the unit set out in the Agreement would not, as respondent counsel has argued, result in the smooth working of the province-wide bargaining regime. It would have the opposite effect and be disruptive of the scheme because it would result in the composition of the appropriate bargaining unit being determined by the designated bargaining agencies. There would be no protection against them agreeing to include trades not included in their designations, or even trades covered by other designations. That would be highly disruptive of the scheme.

29. For these reasons, the respondent's submissions have not convinced the Board that it should describe the bargaining unit in this certification application so as to conform with the bargaining rights described in the Agreement. Therefore, on the first ground, the employer has failed to convince the Board that it should reconsider its decision.

30. The Board will deal with the respondent's second ground for its application for reconsideration along with the application for reconsideration of the group of employees.

31. A group of employees who were welders employed by the respondent on the date of the certification application have also made a request for reconsideration. The employees state that they were never alerted by the notice of application for certification that was posted at the respondent's premises that this application for certification would affect them. The notice of application for certification only made reference to plumbers and steamfitters and their apprentices. It made no reference to welders. Furthermore, these employees submit that they made reasonable enquiry to ascertain whether they would be affected by the application and that none of their enquiries alerted them to the possibility that they might be affected were the applicant to be certified.

32. The employees submit that it is unfair to bind them to a decision of the Board without first affording them an informed opportunity to participate in the process that led to that decision.

33. Their concern arises out of the fact that, subsequent to its certification, the applicant referred to the Board for final and binding arbitration under section 124 of the *Act* the grievance described at paragraph 8. It alleged that welders employed by the respondent were performing work falling within the scope of the Agreement and that they were employed contrary to the terms of the Agreement. They are concerned that those welders who were in the employ of the respon-

dent on and after the date of making of the application for certification and who, after the respondent became bound to the Agreement, were performing work coming within the scope of the Agreement, might find themselves subsequently replaced by union members or obliged to become union members themselves in order to retain their jobs.

34. Respondent counsel contends that the effect of the Board having focused on the designation orders for defining the section 144(1) bargaining unit, instead of defining it to conform with the bargaining unit in the Agreement, has been to deprive the respondent and any of its employees who would be bound by the Agreement "...of notice of the impact and legal significance of the application.". That deprivation of notice, counsel submits, is a denial of "...their fundamental rights to natural justice.". Counsel for the group of employees contends that "[w]hen a group of employees are going to be ultimately affected by a disposition to be made by an administrative tribunal they are entitled to be put on notice of the proceedings. To do otherwise constitutes a fundamental denial of natural justice.". In that respect, counsel for the employees relies on *Re Bradley et al*, and *Ottawa Professional Firefighters Association et al*, [1967] 2O.R.311 and *Re Hoogendoorn and Greening Metal Products & Screening Equipment Co. et al*, [1966] 2O.R.746.

35. The issue which is the source of concern for the respondent and the group of employees is the applicant's claim that welders employed by the respondent were performing work falling within the scope of the Agreement and that they were employed contrary to the terms of the Agreement. That is a problem of interpreting the Agreement, not, as presented in the applications for reconsideration, a bargaining unit definition problem. The proper context in which to decide that issue is the grievance and arbitration process, whether under the Agreement or section 124 of the Act, not in the context of an application for reconsideration of the Board's decision certifying the applicant. It is in the grievance context which deals with that issue where the employees might arguably have an interest and be afforded an opportunity to be heard on the issue. Indeed, the grievance and arbitration process was the context in which the issue of proper notice to an employee arose in each of the *Bradley* and *Hoogendoorn* cases on which counsel for the employees relies. The Board did not find them of assistance in these applications for reconsideration, having regard to the reasoning set out below. That is the context also in which the parties could seek a determination of the extent of the applicant's bargaining rights for employees of the respondent.

36. The grievance which gave rise to these applications for reconsideration is not before the Board; however. It was settled between the applicant and respondent without need to be litigated before the Board. What is before this panel of the Board are the applications of the respondent and the group of employees that the Board reconsider and vary or revoke its decision to certify the applicant, applications based in part on the claims that the Board's notice to employees about the application for certification did not alert them to the fact that they would be affected by the application. The notice to employees which the respondent and the employees claim was inadequate is the Board's Notice in Form 78: "Notice to Employees of Application for Certification, Construction Industry Before the Ontario Labour Relations Board". It identified the applicant and informed the employees that the applicant was seeking to be certified to represent in bargaining plumbers, steamfitters and their apprentices employed by the respondent in the ICI sector of the construction industry in the Province of Ontario, and in all other sectors in certain specific Board geographic areas not relevant to the application for reconsideration. The Notice also informed them of the requirements to be met if they wished to file objections to the application. Specifically, it advised employees that, if they wished to object to certification of the applicant, they must make their objections in writing to the board on or before the terminal date set for the application. In the Board's view, that was sufficient and proper notice of the proceedings. The employees were on notice of the fact that the applicant was seeking to represent the respondent's plumbers, steamfitters and their apprentices, and if they wished to participate, how to do so. It is up to the employees

to inform themselves of whether they have a legal interest which might be adversely affected and to decide whether to participate. If they choose to get involved, then they must do so at the appropriate time. The group of employees who made the application for reconsideration did make inquiries. Their inquiries apparently did not disclose the concern which now motivates them, the threat which they perceive to their employment as welders with the respondent. That is what they contend the Board's notice should have done; specifically indicated that, if the applicant was certified to represent plumbers, steamfitters and their apprentices, it might mean that a welder would have to be a plumber or steamfitter, or an apprentice thereof in order to continue employment with the respondent. That is nothing less than a claim that the Board should give notice of specific, potential legal consequences which might flow from a certificate should one issue in an application for certification. Such notice is neither required nor appropriate. The legal consequences flowing from a certificate will depend on the union's exercise of its newly acquired rights and the legal consequences would only become known when a particular issue arose from that exercise and was dealt with in the appropriate forum, as would have been the case had the applicant's grievance been litigated.

37. The same reasoning applies to the respondent's second ground for its application for reconsideration described above in paragraph 34. Its claim that the respondent and its employees were deprived of proper notice is a claim that the Board should have given the respondent and its employees notice of specific, potential legal consequences which might flow from a certificate should one issue in the application for certification. As the Board has already stated for reasons given above, such notice to employees is neither required nor appropriate. For the same reasons, such notice to the respondent is neither required nor appropriate. The respondent was given Notice in Form 77 "Notice of Application for Certification, Construction Industry Before the Ontario Labour Relations Board". Amongst other things, that Notice identified the applicant and informed the respondent that the applicant had applied to be bargaining agent for the respondent's journeyman and apprentice plumbers and steamfitters in a bargaining unit described in terms which, for all practical purposes, were the same as the unit described above at paragraph 4. The Notice also required the respondent to send to the Board a reply and a list of the respondent's employees who were employed on the application date in the unit proposed by the applicant. These were to be sent not later than the terminal date set for the application given in the Notice. The reply provided for the respondent to describe the bargaining unit which it claimed to be appropriate for collective bargaining. If the respondent chose to propose a unit which was different from the applicant's unit, the Notice instructed the respondent to indicate on the list of employees "...the name and classification of any person..." whom the respondent proposed should be deleted from or added to the list. Therefore, the Notice specifically informed the respondent of the nature of the application and, by reference to the reply, gave the respondent the opportunity to propose a different bargaining unit than the one proposed in the application and to name the employees who would be included in the respondent's unit. Therefore the respondent was on notice of which employees the applicant was seeking to represent and what the respondent needed to do if it proposed that the applicant be required to represent a different unit of employees. It is the Board's view, as with the Notice to Employees, that was sufficient and proper notice of the proceedings before the Board.

38. In these circumstances, therefore, the respondent's application is denied on the second ground and the application for reconsideration on behalf of the group of employees is also denied.

39. In the result, the Board will not reconsider and vary or revoke its decision to certify the applicant pursuant to section 144(2) of the Act.

2167-91-U; 2168-91-R United Steelworkers of America, Complainant/Applicant v. Weatherstrong Building Products Ltd., Respondent v. Group of Employees, Objectors

Certification - Representation Vote - Settlement - Unfair Labour Practice - Parties' settlement of certification application and related unfair labour practice complaint requiring Board to conduct representation vote - Board seeing no reason not to act on that agreement of the parties - Board directing representation vote

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *G. O. Shamanski* and *R. R. Montague*.

DECISION OF THE BOARD; January 22, 1992

1. This is an application for certification involving an array of charges, a request for certification pursuant to the provisions of section 8 of the Act, a related section 91 (formerly section 89) complaint, and a statement by employees in opposition to the application for certification.

2. The matter initially had been set down for 5 days of hearing. Instead, however, the parties on their own have been able to piece together what counsel for the applicant quite properly describes as "a positive and creative approach to a complicated certification application". One element of that omnibus settlement, however, requires the Board to conduct, in its usual way, a representation vote amongst the employees in the bargaining unit. Because of that the parties have had to submit their agreement - somewhat gingerly, as a result, we gather, of some varying experiences with the Board in the past - to a panel of the Board for its approval.

3. Given the apparent history surrounding this issue, we feel it appropriate to express the views of the Board somewhat more fully. The Labour Relations Board of this province, as anywhere, is a public-service tribunal, and exists for the purpose of doing what it can to facilitate the timely resolution of workplace disputes. As a "creature" of statute, the powers of the Board in that regard are subject of course to the bounds determined for it by the governing legislation. But as with the question of the Board's remedial powers in general, both the Board and the Courts have recognized that there would be little by way of "public policy" to support the adoption of a narrow construction of those powers. Compare *Radio Shack*, [1979] OLRB Rep. Dec. 1220, upheld (*Re Tandy Electronics Ltd. and United Steel Workers of America et al*) 26 O.R. (2d) 68, 80 CLLC ¶14,017 (Ont. Div. Ct.), application for leave to appeal to Court of Appeal dismissed March 10, 1980. Here, the parties have satisfied themselves, as evidenced by their written agreement, and having regard to the provisions of the *Labour Relations Act* and the potential results thereunder, that the facts and material before them render it appropriate that this case proceed directly to a vote under the Act for a resolution of the "representation" issue. The Board sees no reason not to act on that agreement of the parties. Indeed, as an alternative to litigation, there would appear to be nothing standing in the way of all parties to a proceeding agreeing as a fact that the Board is in a position to exercise *any* jurisdiction conferred upon it by the statute.

4. The Board accordingly directs that a representation vote be taken amongst the employees of the respondent in the bargaining unit, consisting of:

All employees of the respondent in the Town of Smiths Falls, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff.

All those employed in the bargaining unit on the date hereof, who are so employed on the date the vote is taken will be eligible to vote.

5. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
 6. The matter is referred to the Registrar for the conduct of the aforesaid representation vote.
 7. Board File No. 2167-91-U is adjourned *sine die*, having further regard to the agreement of the parties. Unless within a period of one year from the date hereof either party requests that the Board proceed with the matter, it will be terminated.
-

3065-89-R; 3135-89-U International Brotherhood of Electrical Workers, Local 105, Applicant/Complainant v. Wm. J. Davidson Electric Inc., Respondent

Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *L. Steinberg* and *G. Aitken* for the applicant/complainant; *William J. Davidson* and *Brent Foreman* for the respondent; *William P. Dermody*, *M. Spicer* and *Duane Elliott* for the Group of Employees.

DECISION OF THE BOARD; January 24, 1992

1. File No. 3065-89-R is an application for certification made under subsection 146(1) [formerly 144(1)] of the *Labour Relations Act* in which the applicant is seeking to be certified pursuant to subsection 146(2) for electricians and electricians' apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors in Board area 26. Board area 26 includes the Regional Municipality of Hamilton-Wentworth, the City of Burlington and portions of adjacent towns and geographic townships. At the making of the application, the respondent operated an electrical contracting business out of the City of Burlington on job sites in Burlington, Oakville and the City of Scarborough. The applicant also seeks to be certified pursuant to section 8 of the Act without need of a representation vote.
2. File No. 3135-89-U is a complaint made under section 91 [formerly section 89] of the Act alleging that the respondent has engaged in conduct which violated sections 65, 67 and 71 [formerly sections 64, 66 and 70] of the Act and caused the employment of Kevin Beattie and Claas Nyman to be terminated prior to the making of the application and in contravention of the Act. The applicant/complainant relies on the section 91 complaint for support of its application for certification under section 8.
3. For ease of reference, the Board will refer to the applicant and complainant as "the applicant" or "the union".

4. The application was made March 12, 1990 and the complaint was made March 14, 1990. The events which are alleged to constitute violations of sections 65, 67 and 71 of the Act took place for the most part within the two-week period leading up to the application. The Board heard evidence relative to those events from William Davidson and Al Fairfax for the respondent, Kevin Beattie, Claas Nyman and Mike Van Goch for the applicant and Duane Elliott for the objectors. Davidson and Fairfax testified on June 28 and 29, 1990. Beattie gave his evidence in-chief and cross-examination on September 28, and re-examination on October 12th. Nyman testified on October 12th. Van Goch and Elliott testified on January 15, 1991. The Board also heard evidence about other matters relating to the application and complaint from Charles Beaney, Michael Kirby and Tom Keagan, for the applicant. Beaney testified on October 12, 1990, the others testified on January 15, 1991. The Board's conclusions of fact have been made having regard to its assessment of the witnesses' credibility based on the usual criteria, the submissions of the parties and what is reasonably probable in all of the circumstances. There is substantial conflict between Davidson's evidence and that of Beattie, Nyman and Van Goch, and that is dealt with in the specific instances. The parties made full submissions on the issues raised by the application and complaint and the Board has reviewed and considered them carefully in arriving at its conclusions of fact and law. The Board has not attempted to summarize in this decision their complete arguments, but it has made references to them on particular issues where it was useful to do so.

5. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under subsection 141(1) [formerly subsection 139(1)] of the Act on December 12, 1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.

6. The Board further finds that this is an application for certification within the meaning of subsection 121 [formerly subsection 119] of the *Labour Relations Act* and is an application made pursuant to subsection 146(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 119(e) [formerly clause 117(e)] shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

7. The Board further finds, pursuant to section 146(1) of the Act, that all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. The parties disagree whether Beattie and Nyman were at work in that unit on the date of making of the application, March 12, 1990. The list of employees which the respondent filed in accordance with the Board's Rules of Practice included the names of two persons: Duane Elliott and Ted Pitura. They were apprentice electricians at the time and acted as leadhands for the respondent. There is no dispute about them. There were other persons employed by the respondent on its job sites on or about the application date, but the parties agreed that they were not at work in the unit on that date. The applicant contends, of course, that the names of Beattie and Nyman should be on the list as well. A petition opposing the application and bearing the names of persons purporting to be employees of the respondent was filed also.

9. The resolution of the list dispute depends upon the resolution of the principal issue in these matters; that is, whether, as the applicant alleges, the respondent has engaged in unfair labour practices prohibited by the Act which caused the employment of Beattie and Nyman, or either of them, to be terminated prior to the date of making of the application.

10. The respondent takes the position that they quit their employment prior to that date. If their employment was terminated because of the respondent's alleged unlawful conduct, they would be employees within the meaning of the Act for purposes of the application. There is no dispute that Beattie would have been employed in the bargaining unit on that date as an apprentice electrician. The applicant makes the same claim for Nyman on the grounds that, prior to termination of his employment, he was registered with the Ministry of Skills Development as an apprentice electrician, had been performing the work of an apprentice electrician and, but for the respondent's alleged unlawful conduct, would have been doing so on the application date. The respondent takes the position that Nyman was not employed as an apprentice electrician and that, at all times prior to the termination of his employment, he spent the vast majority of his working time picking up and delivering materials for the respondent's various jobs and performing the work of a construction labourer. The resolution of that issue goes to whether Nyman's name would be on the list of employees used to determine the adequacy of the applicant's membership support for its application for certification, including its application to be certified under section 8 of the Act. Finally, should the Board find that the respondent has engaged in unfair labour practices contrary to the Act, the Board would have to decide whether the unfair labour practices were so grave that the Board should exercise its section 8 discretion to certify the applicant without taking a representation vote.

11. Section 8 of the *Labour Relations Act* states:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

The applicant also relies on the following unfair labour practice provisions of the Act in sections 65, 67 and 71 of the Act:

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

12. William Davidson is the president and owner of the respondent and, at the times material to the application, was its only journeyman electrician. He is excluded from the bargaining unit. The respondent began business as an unincorporated proprietorship in late 1988 and was incorporated June 4, 1989. Nyman was hired during the last week of September 1989 after he responded to a classified advertisement in the Hamilton Spectator for apprentice electricians. Beattie also replied to an advertisement in the Hamilton Spectator. He telephoned the respondent after seeing the advertisement, but was told by Davidson that the respondent did not have any work at the time. A couple of weeks later Davidson called back and made an interview appointment with Beattie for Monday of the last week in September. He began employment the following month.

13. Beattie had been considering the possibility of organizing the respondent's employees when he answered the advertisement. When he was hired, the union decided that he should try to organize them. He was not a member of the union at the time. He had made application for membership in the union when he began his apprenticeship, but had not been inducted into membership by the time he was hired by the respondent. He had no opportunity to talk to any of the respondent's employees about the union before January, 1990 because he was always working with Davidson's brother Mike. After that he and Mike Davidson began work on a contract which the respondent had at a Red Lobster Restaurant in Scarborough. The two of them were the only employees on the job at first. More employees were added for one or two days per week as the job progressed. During the last two weeks of Beattie's employment, there were three to five employees on it one or two days per week. Between January and the end of February, Beattie confined his comments to employees about the union to remarks about unionized employers paying higher rates than the respondent, or about employees on unionized jobs being finished work on Friday afternoons while the respondent's employees were still working. Then, after Beattie was inducted into the union on February 27th, he tried to talk singly with employees when neither Pitura nor Elliott were in the vicinity. Beattie explained the union to employees and tried to gain their interest in it. He testified that "a lot" of the employees were interested in knowing more about the union and what it could do. He spoke to Nyman around March 1st. At the time he thought Nyman also might be organizing for the union because of an event on February 27th which is discussed later in the decision. Beattie simply asked Nyman if he knew Graeme Aitken. When Nyman

responded positively, Beattie was satisfied that Nyman was also working in the union's interest because Aitken is a full-time organizer for the union.

14. Nyman had spoken to Aitken around the first week of February to see where else he might further his wish to begin his apprenticeship as an electrician. He had learned by then that many of the respondent's employees were not journeymen electricians and the respondent would not likely be able to carry him as an apprentice electrician. Nyman began talking about the union to other employees of the respondent during the second and third weeks of February. He testified that they showed a sincere interest in the union. There is no evidence that Nyman had contacted the union prior to being hired by the respondent, or at any intervening time until the first week of February.

15. Beattie worked with Mike Davidson from the start of Beattie's employment with the respondent. Davidson arranged this because his brother was prohibited by law from driving and Beattie could drive for the two of them. Beattie picked up Mike Davidson each morning, drove to the shop to pick up their truck and then went together to whichever job they were working on. Sometimes they picked up materials or equipment at the shop to take to their job. At the end of the day, they left the job together and returned the truck to the shop. Sometimes the shop was locked when they returned. Other times Davidson would be there and they would get instructions for the next day. Davidson would talk to them and other employees about the day's work. On most days the respondent's employees returned to the shop after work. Beattie was in the shop after work about three days per week during the last three weeks of his employment.

16. When Beattie and Mike Davidson returned to the shop on February 27th around 5:30 p.m., Davidson, Fairfax, Elliott and Pitura were in the shop talking in a group. Beattie and Mike Davidson joined them. Nyman was not there. He had returned to the shop around 5:00 p.m., unloaded some material at the rear of the shop and then asked Davidson where he was to work the next day. It appeared to Nyman that there had been a meeting and, in his words, "most everyone was there". He was not asked to stay and left after confirming with Davidson that he was to return the next day to the Scarborough Red Lobster job. Beattie and Davidson gave substantially different accounts of what happened at the meeting after Beattie and Mike Davidson joined the others. Their accounts are the only evidence before the Board about what took place in the meeting because neither Fairfax nor Elliott testified on that subject.

17. According to Beattie, Davidson asked him if he was going to the union meeting that evening. Beattie was not surprised that Davidson knew of the meeting because he believed him to be a member. His belief is consistent with Davidson's evidence. Beattie replied in the affirmative. He had been notified by letter that he was to be inducted as a member at the meeting. He told Davidson he had to go because his two uncles had been trying for a long time to have him admitted to membership. Davidson told Beattie that, if he became a member, he could not work for the respondent; the respondent was a non-union shop and if Beattie became a member, it would give the union the right to petition to represent the respondent's employees. Davidson told Beattie that he wanted him to stay with the respondent and not join the union; that he would be getting a raise if he stayed; that the respondent would be bringing in benefits for the employees soon; that the respondent would be one of the biggest non-union shops around and never be without work. Davidson told Beattie that, on the other hand, if he joined the union and continued to work for the respondent, the respondent would have to close the doors and everyone would be out of a job. Davidson commented several times during the meeting that the respondent would close and everyone would lose their jobs if the union came in. When the union was the topic of discussion, according to Beattie, Davidson did most of the talking and he was against the union. Beattie also stated that Davidson, Pitura and Elliott raised Nyman's name several times and wondered whether he

might be going to the union meeting, but Beattie did not know why they were concerned about Nyman. Beattie said that the meeting lasted for an hour and a half to two hours, during which they discussed the respondent and the pros and cons of the union. After the meeting ended, Mike Davidson told Beattie that his brother wanted to see Beattie in his office. Beattie went to the office and was there for approximately fifteen minutes with Davidson. No one else was there and Davidson repeated what he had said in the shop about not wanting Beattie to join the union; about a raise and benefits and about having to close the shop if the respondent was unionized.

18. Davidson denies that he met Beattie alone after the meeting in the shop and his account of the shop discussion ran as follows. Davidson, his brother, Fairfax, Pitura, Elliott and Beattie were present and it was Beattie who introduced the subject of the union. Beattie mentioned a letter which he had received from the union telling him that he would be inducted as a member at a union meeting that evening. He told the group that he intended to go to the meeting and report to Davidson on who was there because whoever was involved with the union at the respondent's shop was trying to make it look like Beattie. Beattie named Nyman as the employee involved with the union and the person who was trying to make it look like Beattie was promoting the union. According to Davidson, Beattie asked him if he wanted Beattie to go to the meeting to see who was there. Beattie volunteered to take care of Nyman if he found him there. Davidson told Beattie not to go to the meeting on his behalf. Davidson denies that he made any of the statements during the shop meeting which Beattie attributed to him. In particular he denies saying that he was going to keep the respondent non-union; that Beattie would have to work elsewhere if he joined the union; that there would be raises and benefits for the employees and lots of work if there was no union. He denies that he expressed any opinion of the union at the meeting or that he and others had concluded that it was Nyman who was the union contact in the respondent, after having speculated openly about it.

19. Davidson acknowledges that the union had been mentioned in conversations between him and Beattie prior to the evening of February 27th. Again their accounts differ substantially, including whether one of the events occurred at all. According to Davidson, Beattie was at the shop on the morning of February 27th and gave Davidson the letter inviting Beattie to attend the union meeting scheduled for that evening. Davidson testified that he neither discussed it with Beattie nor read it at the time. When he was challenged in cross-examination that Beattie had not given him the letter, but had left it on the seat of his truck which remained parked all day in the shop yard, Davidson replied that he was unaware that Beattie parked his truck in the yard. He also said that Mike Davidson was present when Beattie gave him the letter. He testified also in cross-examination that he was far too busy to be either concerned about or interested in the letter. Davidson could recall only one other conversation with Beattie in which the union was a topic. Davidson recalled it as having taken place early in November on the Red Lobster Restaurant renovation job in Oakville shortly after the respondent hired Beattie. According to Davidson, he and Beattie were in a room of the restaurant where the respondent stored materials and Beattie showed him a letter from the union and told Davidson the union wanted him to become a member. In cross-examination, Davidson testified that he was too busy to be interested in the letter, to discuss the letter with Beattie or to care whether one of the respondent's employees was in contact with the union. He also stated that he could not recall discussing the union with Beattie or any other employee between the November incident and the one on the morning of February 27th.

20. Beattie's account of his conversations with Davidson in which the union was a topic is as follows. Beattie testified in-chief that he did not show or discuss with Davidson or any employee of the respondent the union letter inviting him to be inducted into the union at the February 27th meeting. When he was cross-examined by counsel for the objectors on that testimony, he denied that he had either discussed or shown the letter to Davidson or any other employee and denied

that he had told Mike Davidson, in particular, that he would be inducted into membership in the union on February 27th. During cross-examination by respondent counsel, Beattie denied also that he discussed with Davidson prior to February 27th any letter from the union. He testified in-chief that Davidson had asked him a couple of times how he felt about the union, but seemed to be satisfied when Beattie responded that he did not want anything to do with the union. He admitted in cross-examination that his response was a lie, but stated that he had lied in order to protect his job. Beattie testified further in cross-examination that the subject of the union was brought up by Davidson while he was telling Beattie about some past event. Beattie recalls the first conversation as being approximately one week after he was hired and that, on this and the other occasions, Davidson expressed a dislike for the union and the opinion that it was useless and the people running it did not know what they were doing. Beattie acknowledged that Davidson did not make any reference in those conversations to what might happen to the respondent if its employees were "unionized".

21. Beattie was late for the union meeting on February 27th and missed the swearing in. He had gone directly from the shop in his work clothes and one of his uncles told him to go home, change his clothes and return to the meeting. When Beattie left the union hall, he noticed Mike Davidson and his sister Angela in a car. He waved to them, but the car continued past him and out of the parking lot to the street. Beattie had met Angela Davidson at Mike's home. Beattie was on friendly terms with him and they saw each other socially about once a week. The parking lot is shared by the union and a funeral home. Therefore, the next day after Beattie picked up Mike Davidson for work, he asked Mike if he and his sister had been to the funeral home. Mike Davidson replied that he had been there to check who was at the union meeting and he acknowledged to Beattie that he had seen him there. He did not tell Beattie how he came to be watching the union hall. Davidson denied sending his brother and sister to watch the union hall. He disclaimed having any knowledge of it before he received the Board's notice of the application for certification. The incident was referred to in the particulars filed respecting the respondent's alleged, unfair labour practices. He testified that he spoke to his brother about the incident because he was upset by the claim, but his brother did not offer any explanation and Davidson did not ask him for one because he thought that it had been a stupid thing to do. He also stated in cross-examination that he did not discuss with Mike anything about the respondent unless it related directly to a job Mike was working on.

22. Beattie did not tell either Davidson that he had become a member of the union. He continued to work the remainder of that week and Monday of the next week, March 5th. The next morning, he picked up Mike Davidson as usual. They stopped at the shop and while Beattie loaded some materials on the truck, Mike Davidson went into the office. When he returned to the truck, he told Beattie that he could not work any more for the respondent because he had become a member of the union. When Beattie asked Mike Davidson why he could not work any more for the respondent, Mike replied that his brother could get into a lot of trouble if Beattie continued to work for the respondent. Beattie took Mike Davidson's remarks to mean that he was fired. He stated that he drew that conclusion because he had considered Mike to be his foreman from the start of his employment and because William Davidson had told him a few days before that he would not be able to work for the respondent if he joined the union. Beattie left the shop, went directly to the union, reported that he had been fired, and was sent to work for another employer. He testified that he did not tell either Davidson on or after March 6th that he had quit. Davidson denies that he instructed his brother to tell Beattie that he could not work any longer for the respondent because he had joined the union.

23. Davidson was on vacation at the time and returned on March 9th. Before he left on vacation, he told Beattie that he had left pay cheques with Fairfax made out for forty hours for the

week ending March 3rd. He told the Board that he informed all of the employees that he had left cheques for them. The employees were paid weekly on Thursdays, although they often received their cheques on Wednesday. Fairfax decided to hold back Beattie's cheque and he did not get a cheque until March 9th when Davidson returned. Fairfax testified that he acted on his own to withhold Beattie's cheque because it was made out for 40 hours and Beattie had worked only until 11:00 a.m. on March 2nd. Fairfax said that he was concerned that he might not be able to recover the overpayment because Beattie no longer was employed with the respondent. Beattie's version of the event was that he called Fairfax on Wednesday morning to arrange to get his cheque. Fairfax told him there was no cheque for him and told him to call back the next day. When Beattie called on Thursday Fairfax told him he would have to wait until Davidson returned from vacation on Friday. Fairfax denies telling Beattie that there was no cheque for him. Beattie eventually received a cheque from Davidson who delivered the cheque to Beattie at his home along with a U.I.C. Record of Employment form recording the reason for termination as "quit".

24. As already stated above, Nyman was not involved with the shop meeting on February 27th. His testimony about what happened to him on and after that date differs substantially from that of Davidson and Fairfax. According to Nyman, Davidson telephoned him late in the evening of February 27th and told him that he was not needed for February 28th. Davidson did not offer him any reason. At the time Nyman had been working at the Red Lobster Restaurant job in Scarborough. A few days earlier, Mike Davidson had told him that the respondent was over 300 hours behind on the project. Nyman did work on the project on the next two days, Thursday and Friday, March 1st and 2nd. Davidson left for vacation on March 1st. He made Elliott responsible for the field staff while he was away and left Fairfax in charge of the office. Elliott telephoned Nyman around 11:00 p.m. on Sunday, March 4th and told him that he did not need to show up for work on March 5th. Elliott called Nyman again on March 5th and told him that he was not needed for March 6th. Elliott gave no reason on either occasion why Nyman was not needed. Fairfax called Nyman between 7:00 and 8:00 a.m. on March 6th and asked him if he could get out to the Scarborough Red Lobster job site. Nyman had car trouble and was unable to get to the job. Late that day, Nyman called Elliott about the rest of the week and was told to report for work. He worked March 7th and 8th, but not Friday, March 9th, although he had been scheduled to work. The reason he gave to the Board for not working was that he was angry about not getting his pay cheque the day before. He believed that he was the only employee who did not get a cheque and, in his words, "I thought they were trying to tell me something". Nyman testified that Fairfax told him that there was no cheque for him and he would have to await Davidson's return for his cheque. Nyman spoke to Davidson on the telephone late Friday afternoon. According to Nyman, Davidson told him that he had forgotten to make it up and would bring it to his home that evening.

25. Fairfax and Davidson each gave different versions of those events. Fairfax stated that he told Nyman on Thursday when he asked for his cheque that he would have to wait until the next day. Nyman neither asked for nor got any reason. Fairfax denied telling Nyman that there was no cheque for him. Fairfax told the Board that he withheld Nyman's cheque because he was certain Nyman had not worked the forty hours for which the cheque had been made out. Fairfax testified also that he had told Nyman on March 6th that he was needed for the remainder of the week. Davidson stated in-chief that Fairfax had withheld Nyman's cheque because he had worked only a half day on Friday, March 2nd and because sometimes he charged personal tool purchases directly to the respondent's account. Davidson did not mention the fact that Nyman had not worked on February 28th. In cross-examination by union counsel, Davidson denied that he had called Nyman on February 27th and instructed him not to report on the 28th. Davidson was challenged that Nyman would testify that Davidson had called him late in the evening of February 27th and told him not to come in on the 28th. Davidson's response was that Nyman's evidence would be wrong; that he, Davidson, would not cancel anyone late on the 27th who had been scheduled to work on

the 28th, instead he would have had them come into the shop and work for four hours. Davidson acknowledged that, if Nyman had been "cancelled" in fact on February 27th, it would not have been for lack of work. Davidson disclaimed any knowledge of Nyman being told by anyone not to report for work on March 5th and 6th, except for being aware that Nyman had car trouble at the start of the week and had not come into work.

26. Davidson testified in-chief that he telephoned Nyman on March 9th to make arrangements for him to get his pay cheque, and criticized Nyman for his poor attitude in not coming to work that day and for not showing up for work on March 5th and 6th while Davidson was on vacation. He stated that Nyman accused him of having a double standard about union membership because he, Davidson, belonged to the union but would not allow his employees to belong to it. Davidson claims that he told Nyman that he was entitled to his opinion but, he, Davidson, had not called him to discuss Nyman's opinions. Davidson telephoned Nyman again late on the afternoon of Sunday, March 11th to tell him where he would be working on Monday. Davidson testified that he made the call from his office in the presence of Elliott and Pitura. They had returned to the office from the Scarborough Red Lobster job where they had been working with two other employees. According to Davidson, Nyman told him he would not report on Monday because he felt that Davidson's criticism on Friday had been a slap in the face. It was also Davidson's testimony that, when he asked Nyman about working on Tuesday, Nyman told him he was quitting. Elliott testified that he and Pitura had asked Davidson for men for jobs and were present when he called Nyman. Elliott stated that he heard Davidson say "What do you mean you're not coming in" and, then, "So you're quitting". He also testified that he had worked with Davidson and Pitura that day and had returned to the shop between 3:30 and 4:00 p.m.

27. Nyman's recollection of his conversations with Davidson on March 9th and 11th differs from Davidson's. He recalled having several conversations with Davidson during the weekend of March 9th to 11th. During these conversations, according to Nyman, he confronted Davidson on three matters: when would Davidson "sign him on" as an apprentice; when was he going to get the raise which he thought had been promised at hire; and, why did Davidson not have the "balls" to ask him if he was involved with the union. Nyman said that Davidson's response to that last statement was that it was unlawful for him to ask Nyman about union membership and, anyway, he ran a non-union shop. With respect to the apprenticeship, Nyman voiced his opinion to Davidson that he could not take Nyman on as an apprentice because the respondent did not have enough journeymen to do so. Nyman said that Davidson responded by telling him that, in his opinion, Nyman was not a good worker. Therefore, Nyman was surprised when Davidson called him on Sunday, March 11th about working on March 12th, and told Nyman that the respondent needed good workers. As a result, Nyman told Davidson that he was unsure whether he would work. He did not work on March 12th. He testified that he quit because he needed to look for a better job.

28. During his cross-examination by respondent counsel and counsel for the objectors, Nyman acknowledged that, when he was hired, Davidson was trying him out and he expected a decision would be made after six months. He agreed that would be approximately March 26th, and he had told Davidson on March 11th that he was quitting before he knew what Davidson's decision would be. He stated that his principal reason for quitting was, having learned by then that the respondent had few journeymen, he believed that he would have to wait too long to become an apprentice. He testified also that another reason for quitting was that he wanted more money and Davidson had told him that his work was not worth it, but had given no reason why he was not satisfied with Nyman's work. Also, respecting Davidson's telephone call on March 11th, Nyman stated that Davidson told him the respondent had lots of work. On re-examination he gave another reason for quitting. His hours of work had been cut in the week ending March 9th. He was given no reason for the cut, and believed that the respondent had lots of work.

29. Mike Van Goch was not employed by the respondent. He got the respondent's name, along with the names of a few other companies from Graeme Aitken. He told Van Goch that they were companies which the union wanted to organize. Van Goch had just finished a 10-week, in-class apprenticeship training course which had started on January 2nd. His recollection was that he telephoned the respondent after the end of the course and during the first or second week of March and met Davidson for an interview the following Sunday at noon. No one else was present. He is positive it was a Sunday because he visits his grandmother on Sundays and had dropped off his wife at his grandmother's home on his way to the interview. He describes the interview as having lasted fifteen to twenty minutes and that, at one stage, Davidson had told him that he would not be hired if he was from the union because he, Davidson, did not want his shop unionized. At the end of the interview, it was left that Davidson would telephone Van Goch and did so that evening, telling him that the respondent did not need anyone just then. In cross-examination, when Van Goch was asked to be more specific about when he had called the respondent and when the interview took place, he related the events to the end of the apprenticeship course and stated that he had called on a Friday within one week of the end of the course, and that the interview had taken place on the following Sunday. He stated that he reported the interview to Aitken the next day when Aitken called him. He stated also that Davidson introduced the subject of the union early in the interview, but did not pursue the subject after Van Goch told him he was not from the union. He claims that Davidson had said that he did not want the respondent to be unionized and did not want to hire anyone from the union. Davidson was challenged during his cross-examination that Van Goch would testify that Davidson had interviewed him on or about March 11th and had told Van Goch that the respondent was non-union and going to stay that way and, if he wanted to work for the respondent, he should have nothing to do with the union. Davidson's response was that, if Van Goch said that he was interviewed by Davidson on Sunday, March 11th, he has never given an interview on a Sunday, does not discuss the respondent's business with anyone, does not know the name Van Goch and, the alleged conversation never took place.

30. With respect to the matter of the work which Nyman was performing for the respondent prior to the termination of his employment, and whether he would have been employed as an apprentice electrician had he been employed by the respondent and performing that work on March 12th, the relevant evidence is as follows. Nyman entered into a contract of apprenticeship with the Local Apprenticeship Committee of Central Ontario for the Electrical Trade. It is an employer within the meaning of section 1 of the *Trades Qualification Act*, R.S.O. 1990, c.T.17 [formerly the *Apprenticeship and Tradesmen's Qualification Act*]. For ease of reference, the Board will refer to that Act as the "Trades Act". The contract was registered under that Act with the Director of Apprenticeship on February 23, 1990. That is also the effective date of the contract. Nyman did not inform Davidson of the contract and he had no knowledge of it. According to Davidson, during Nyman's employment, eighty-five percent of his working time involved picking up and delivering materials and performing work which Davidson described as labouring work and fifteen percent involved helping electricians. He described the labouring content as cleaning the shop and the respondent's van, trenching, painting plywood backboards, some carpentry, installing ceiling T-bars which support light fixtures, installing the fixtures and installing the light tubes in the fixtures. Davidson described the clean-up work as straightening up materials in the shop and in the respondent's vans, putting tools in order and disposing of scrap materials. Davidson did not place any estimate on the amount of time Nyman spent on clean-up. With respect to trenching work, Davidson testified that Nyman did trenching on and off during three days on a job in Lowville and for a total of sixty-two hours on the Harvester Road job. He also did trenching on the Scarborough Red Lobster job during four days in each of the weeks ending February 23rd and March 3rd. The trenching on that job was for an outside duct bank. It involved the use of a jackhammer to break the ground and, after a contractor removed the earth, using shovels to trim the sides and bottom of

the trench. After the ductwork was installed in the trench, Nyman helped with the concrete pour over the ductwork.

31. Beattie testified about work he saw Nyman do on the Scarborough Red Lobster job. His evidence-in-chief was that he worked with Nyman three to four days per week near the end of his own employment. He described work performed by Nyman as including hooking up pot lights, running wire for electrical outlets, pulling wire through conduits, strapping conduits to walls and ceilings. He elaborated on that evidence during his cross-examinations by counsel for the respondent and for the objectors. He testified that Nyman came to the Red Lobster job while Beattie and Mike Davidson were installing pot lights. Beattie's evidence did not pin point when that was, but Beattie testified that he was on vacation during the two weeks ending February 17th and 24th. It is clear from documentary evidence, supported by *viva voce* evidence that Beattie was on that job during all of the week ending March 3rd and on March 5th. Beattie estimated that there were seventy-five to one hundred pot lights to be installed. Mike Davidson told Nyman what work he could/could not do. Nyman worked from blue prints and placed wire for the pot lights. Beattie showed him how to hook up the lights and Nyman did the work. Nyman also helped Beattie and Mike Davidson pull wire when needed.

32. Nyman testified in-chief that his pick-up and delivery work involved no more than two or three hours at a time and less than two days per week; that he did no painting and did a total of approximately four hours of carpentry work. He agreed that he did trenching on the Harvester Road and Scarborough Red Lobster jobs, but denied doing any on the Lowville job. The trench was already dug on the latter job and he worked on pulling in the wiring and installing an outside fixture. He was on the Scarborough Red Lobster job doing trenching for two to two and one-half days, working at first with Mike Davidson and Tom Postulnik. Later, they were joined by Davidson, Elliott and Pitura. On the Harvester Road job, Nyman stated that the trenching work which he did involved approximately two hours of trenching and laying ductwork. Nyman also described in-chief other work which he did for the respondent. It included pulling wire, hooking up fixtures, installing receptacles, switches, baseboard heaters and cooling fans. He performed that work on the Ennisclaire Centre, Harvester Road and Kelley's Restaurant jobs and on a job in Dunnville. He worked with Elliott who showed him what to do. Nyman did the work and Elliott checked it. He testified also that he worked with Beattie on the Scarborough Red Lobster job installing pot lights and pulling wire, work which he said Beattie was doing as well. He did whatever work Beattie gave him to do, as he had done with Elliott on the other jobs. Nyman also owned his own hand tools and used them on the work described above. He saw Elliott, Pitura and Beattie using the same kind of tools when he worked with them. The Board notes that the tools he described are commonly used in the electrical trade. Nyman was not shaken on cross-examination of his evidence about the work which he did for the respondent. He stated that he spent approximately one hour per month cleaning the shop and he agreed that he spent a lot of time on jobs pulling wire. Elliott did not testify about any of the work which Nyman said he did with him.

33. Where, as here, it has been alleged that an employee has been discharged or otherwise dealt with contrary to the Act "...as to his employment, opportunity for employment or conditions of employment...", subsection 91(5) of the Act places on the employer the burden of proving that it did not act contrary to the Act. The subsection states:

(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization. R.S.O. 1980, C.228, S.89 (1-5).

The Board in *The Barrie Examiner*, [1975] OLRB Rep. Oct.745, at paragraph 17 defined as follows the standard of proof required of an employer in order to satisfy the Board that the employer did not act contrary to the Act:

17. What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer...did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.* [1974] O.L.R.B. 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

While in that case the Board was dealing with an alleged discharge of an employee, the principle applies to any allegation that an employee has been dealt with contrary to the Act with respect to his employment, opportunity for employment or conditions of employment. Thus an employer must establish on the balance of probabilities that its conduct which is alleged to constitute the violation of the Act was not tainted by anti-union motive in order for the employer to satisfy the Board that it has not contravened the Act. That burden requires the employer to be forthcoming with credible evidence that its impugned conduct was free of any anti-union motive.

34. Were the Board to accept Davidson's evidence and, where it conflicts with the evidence of Beattie, Nyman and Van Goch, prefer his evidence to theirs, the employer would be found to have satisfied the burden of proof that it had not acted contrary to the Act. In that result, the complaint and application would be dismissed. Unfortunately, there are credibility problems with the testimony of all four of them which make it difficult to resolve the conflicts in their evidence, although the problems are not of the magnitude which would discredit all of the testimony of any of them. Clearly, there is significant conflict in the evidence of Davidson and Beattie about the events preceding the termination of his employment. Certain of Beattie's evidence stands uncontradicted, however: his evidence that Mike and Angela Davidson were outside the union hall where Beattie attended the union meeting on February 27th, that on the next day Mike Davidson told Beattie that he had been there to observe who was attending the meeting, and that Mike Davidson had told Beattie on March 6th that he could not work for the respondent any longer because he was a member of the union.

35. The last of those events is a critical element in the issue of whether Beattie's employment was terminated because of his union membership or his exercise of other rights under the Act. If Mike Davidson exercised managerial functions for the respondent or acted at Davidson's request or with his condonation, his conduct would constitute a breach by the respondent of section 67 of the Act. While the applicant had contended in its pleadings that he was a foreman for the respondent, in final argument, applicant counsel acknowledged that the evidence fell short of establishing that fact.

36. Counsel argued, however, that Mike Davidson was the conduit through which Beattie received Davidson's orders respecting what jobs he was to be on and what work he was to do on them, and that on the job, Mike Davidson assigned work to Beattie and determined when they were to start and finish work. Those factors, coupled with Beattie's respect for Mike Davidson on

the job and the fact that he was the brother of the owner of the respondent, made it reasonable for Beattie to assume that Mike Davidson had more authority than Beattie did. Thus, as the Board understands counsel's argument, it was reasonable for Beattie to assume that Mike Davidson was acting on behalf of the respondent when he kept watch on the union hall to see who attended the meeting and when he told Beattie that he could no longer work for the respondent because he was a member of the union. All of which, according to counsel, made it essential that the Board hear Mike Davidson's explanation of his actions. The respondent's failure to call him and have him explain his conduct should cause the Board to draw the inference that his evidence would have been adverse to Davidson's claim that he neither condoned his brother's conduct nor had asked his brother to watch the union meeting or tell Beattie he could no longer work for the respondent.

37. The Board agrees with respondent counsel that Beattie's own evidence does not support a conclusion that Mike Davidson was the conduit through which Beattie got Davidson's orders. It agrees also with counsel that Beattie's starting and quitting times were simply a factor of him and Mike Davidson travelling to and from work together and that any recognition of "higher authority" which Beattie may have had for Mike Davidson was simply recognition of his greater experience in electrical work. That does not mean, however, that the Board is unconcerned about the respondent's failure to call Mike Davidson as a witness. The Board has no ground for not believing Beattie's uncontradicted evidence about him watching the union hall on February 27th to see who went to the meeting and that he told Beattie on March 6th that he could no longer work for the respondent because he was a member of the union. There is absolutely nothing which suggests that those events are a total fabrication. Without Mike Davidson's testimony, the Board is left with no explanation for his conduct and with Davidson's bald denial that he had nothing to do with his brother's conduct. If Davidson had neither authorized nor instructed his brother to take either action on February 27th or on March 6th, it is difficult for the Board to understand Mike Davidson's conduct on those two days. If he was not acting on his brother's behalf, why would he act on his own to watch the union hall to see who attended the union meeting and to later tell Beattie that he could not work for the respondent anymore because he was a member of the union? He and Beattie were not just co-workers, they were friends who socialized outside of work on a weekly basis and continued to do so even after Beattie ceased working for the respondent. By not calling Mike Davidson to testify, the respondent has deprived the Board of his explanation for his conduct and left it with a significant gap in the evidence about a material allegation of unfair labour practices of which Mike Davidson would have knowledge. Coincidentally, the Board also was deprived of his testimony concerning whether, after the shop meeting on February 27th, he had told Beattie to report to Davidson's office. While that evidence would neither prove nor disprove Beattie's claim of a private meeting with Davidson, it might have helped resolve the conflict in that evidence.

38. The Board has no explanation why the respondent did not call Mike Davidson and, in the circumstances just discussed, the Board is satisfied that he should have been called. Therefore the Board is justified in drawing the inference that Mike Davidson's evidence would have been unfavourable to the respondent. That justification is reinforced by the respondent's obligation under subsection 91(5) of the Act to establish on the balance of probabilities that it has not acted contrary to the Act, and the associated evidentiary obligation to be forthcoming with credible evidence that its impugned conduct was free of anti-union motive. In the Board's view, there are reasonable grounds in the circumstances of this case to infer that Mike Davidson's evidence would have revealed that he was acting on Davidson's behalf and on behalf of the respondent when he watched the union hall on February 27th to see who attended the meeting and when he told Beattie on March 6th that he could not work for the respondent because he was a member of the union, and the Board so infers. The Board finds, therefore, that through Mike Davidson, the respondent

made it clear to Beattie that, at the very least, his membership in the union was incompatible with his continued employment by the respondent.

39. That finding of an anti-union motive for the respondent's action has ramifications far beyond those two incidents. Davidson repeatedly denied statements and actions attributed to him which, if found to have been made or taken, would demonstrate clearly an anti-union animus. There can be no doubt that, when Davidson speaks or acts, it is the respondent speaking and acting. That was evident from his demeanour as a witness. It was also made clear by specific evidence like that which caused the Board to agree with respondent counsel that Mike Davidson was not the conduit through which Beattie got his orders from Davidson. They passed from Davidson to Beattie directly, as they did to the other employees. Therefore, in light of the inference drawn by the Board and its conclusion that the respondent made it clear to Beattie that his membership in the union and employment with the respondent were incompatible, the Board is of the further view that Beattie's evidence is to be preferred over that of Davidson where their evidence conflicts respecting what was said by either of them about the union generally and Beattie's membership or non-membership in it in particular. Their evidence about what took place at the shop meeting on February 27th is the only evidence because, of the employees attending the meeting, only Fairfax and Elliott testified in these proceedings, and they did not testify about the content of the meeting. As a result, the Board makes the following findings of fact and notes that, because of these findings, it is unnecessary that the Board resolve the conflict in the testimony of Davidson and Van Goch.

40. Davidson raised the subject of the union several times in conversations with Beattie prior to February 27th, beginning approximately one week after he was hired. Davidson inquired of Beattie whether he was interested in the union. He also expressed to Beattie his dislike of the union and his low regard for the persons running it, but made no references to what might be the consequences if the respondent was unionized. At the meeting in the shop on February 27th, attended by all of the respondent's employees at the time, except Nyman, Davidson:

- (1) asked Beattie whether he would be attending the union meeting that evening and, when Beattie responded that he would be attending because he had been invited to be inducted into membership, Davidson told Beattie that the respondent was non-union and he could not work for the respondent if he became a member;
- (2) told Beattie that he wanted Beattie to continue working for the respondent and not to join the union;
- (3) told Beattie that he would be getting a raise if he stayed, that the respondent would soon be introducing benefits for its employees, and that the respondent would soon be one of the largest non-union shops with lots of work;
- (4) stated several times during the meeting that if the union came in, the respondent would close and everyone would lose their jobs;
- (5) was critical of the union when it was the subject of discussion; and,
- (6) speculated openly as to whether Nyman might also be going to the union meeting that night, in which he was joined by Pitura and Elliott.

After the shop meeting, Mike Davidson told Beattie that Davidson wished to see him in his office.

Beattie met Davidson alone in the office for approximately fifteen minutes. During the meeting, Davidson told Beattie again that he wanted Beattie to continue to work for the respondent and did not want him to join the union, that he would be getting a raise if he stayed, that the respondent would be bringing in benefits for its employees and that the respondent would close if the respondent was unionized.

41. Davidson's remarks in the shop meeting to Beattie and generally, made it abundantly clear to the employees there, that the union would not be welcome at the respondent, and that the security of their employment was at risk if the respondent became unionized. That message would not be lost on Fairfax and Elliott when Davidson left them in charge of the respondent's operations while he was on vacation from the 1st to the 9th of March. They were parties to several incidents involving Nyman while Davidson was on vacation. It is uncontradicted that Nyman received a call from Elliott late on the night of Monday, March 4th advising him that he was not needed for the 5th, another call on the 5th that he was not needed for the 6th, only to be asked by Fairfax on the morning of the 6th if he would work on the Scarborough Red Lobster job that day. Elliott had given Nyman no reason for telling him that he was not needed.

42. That is similar to the treatment which Nyman claims he received from Davidson on February 27th, just before he went on vacation. His evidence is uncontradicted that Davidson had told him at the shop after work that day to report to the Scarborough Red Lobster job the next day. Davidson denies that he called Nyman late on February 27th and told him that he was not required on the 28th. In view of the Board's findings about Davidson's conduct at the shop meeting on the 27th, the Board prefers Nyman's evidence. It is not seriously contended that there was insufficient work for Nyman on February 28th and March 5th and 6th and the Board is satisfied that lack of work was not a reason for Nyman not being assigned to work on those days.

43. The last thing which happened to Nyman while Davidson was on vacation was Fairfax' withholding of his pay cheque for the week ending March 2nd. That angered Nyman so much that he decided not to work on Friday, March 9th. Nyman thought that he was the only employee who had not received a pay cheque on March 8th and believed that, to use his words, "...they were trying to tell me something".

44. The remaining incidents involving Nyman before he quit occurred between him and Davidson after Davidson returned from vacation. The evidence shows that they had at least two telephone conversations, one on March 9th and the other on March 11th. While their accounts of the conversations differ in detail, there is no doubt that Davidson was critical of Nyman on March 9th. He testified that he criticized Nyman for not working on March 9th and for failing to show up for work on March 5th and 6th while Davidson was on vacation. According to Nyman, Davidson told him that he was not a good worker after Nyman expressed his opinion that the respondent could not employ him as an apprentice electrician because it did not have enough journeymen electricians. There is also no doubt that, when Davidson called Nyman on the 11th, he told Nyman that there was work for him on the March 12th. According to Nyman, this surprised him because, two days earlier, Davidson had told him that he was not a good worker and, because of that, he told Davidson he was unsure if he would work on the 12th. He did not work. Davidson's account of the conversation is that, when he told Nyman that he was needed on the 12th, Nyman told Davidson that he would not work on March 12th because of Davidson's criticism of him in the earlier conversation. Then, when Davidson asked him if he was going to work on March 13th, Nyman told Davidson that he was quitting.

45. The Board turns now to the issue of whether the employment of Beattie and Nyman, or

either of them, was terminated prior to March 12, 1990, the date of making of this application, because the respondent has engaged in unfair labour practices prohibited by the Act.

46. Davidson's remarks directed at Beattie in the shop meeting on February 27th and in the private meeting afterward were a clear message that Beattie could not be a member of the union and continue to be an employee of the respondent. The reasonable inference to be drawn from the message is that Beattie's employment with the respondent would be terminated if he joined the union. Carried no further, that is a threat aimed at compelling Beattie to refrain from becoming a member of the applicant contrary to subsection 67(c) of the Act. The threat became a reality on March 6th when Mike Davidson, on behalf of the respondent, told Beattie that he could not work for the respondent any longer because he was a union member. Whether or not Davidson or his brother knew for a fact that Beattie was a member of the applicant, belief that he was is implicit in Mike Davidson's statement to Beattie. Therefore, the Board finds that the respondent terminated Beattie's employment contrary to subsection 67(a) of the Act because of the belief that he was a member of the union. Bearing in mind that, during January and February, Beattie had been injecting references to the union into negative comments made to employees about the respondent's wage rates and Friday hours and had begun trying to organize the respondent's employees immediately after he became a member on February 27th, and that Nyman had started talking to the employees in mid-February, and having regard to the conclusions drawn below respecting Davidson's remarks in the two meetings on February 27th, the Board finds also that the termination of Beattie's employment was a violation of sections 65 and 71 of the Act.

47. Had Davidson confined his remarks at the shop meeting to criticism of the applicant, they might be seen as nothing more than the exercise of his freedom to express his views within the meaning of section 65 of the Act. They were not confined, of course. In addition to his remarks directed at Beattie just referred to, he promised Beattie a raise if he stayed with the respondent, a condition which precluded membership in the union, stated that the respondent soon would be bringing in benefits for the employees and stated several times in the course of the meeting that the respondent would close if the union came in. The last statement, standing alone, is a direct threat to the employees' livelihood and to their security of employment should they choose to exercise their right under the Act to join a trade union, and is a serious breach of sections 65 and 71 of the Act. When the respondent's termination of Beattie's employment is seen in the context of that threat, the threat to Beattie's own employment and the promise of benefit made in front of other employees, and privately, and bearing in mind that, by then, Beattie and Nyman had been talking to employees about the applicant, an unmistakable message was left with the other employees of the consequences which might befall them if they were to join the union or support its attempts to organize the respondent. That is why the Board found above that the termination of Beattie's employment was also a violation of sections 65 and 71 of the Act.

48. Nyman's case is different than Beattie's insofar as Nyman quit his employment. Nonetheless, if he quit because of the respondent's unfair labour practices, the termination of his employment would be de facto a discharge contrary to the Act. For purposes of the Act, it would be as though he had not quit because subsection 1(2) of the Act provides that no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of his being dismissed contrary to the Act.

49. If there are grounds for concluding that Nyman's termination of employment was contrary to the Act, they would have to be found in the way that the respondent dealt with him between February 27th and his quitting. His hours of work were suddenly reduced by three days, February 28, March 5th and 6th. No reason was given to Nyman at the time and none was offered to the Board at hearing. Davidson did offer the explanation that Nyman had previously expressed

a willingness to take time off when the respondent was short of work. The evidence is clear, however, that Nyman had offered to take some time off for a specific purpose earlier in the year when the respondent was cutting back the hours of work for employees. It was not an offer to take time off whenever the respondent was short of work. In any event, there is no evidence of any shortage of work between February 27th and March 12th.

50. The manner in which his hours of work were reduced is significant. Davidson had told Nyman at the end of the work day on February 27th, while the shop meeting was in progress, that he was to report to the Scarborough Red Lobster job the next day. Sometime between the end of the meeting and late the same night, he changed his mind about Nyman working on February 28th. Similarly, with respect to March 5th, Elliott called him late on Sunday night, March 4th, to tell him that he was not needed on the 5th. There is no evidence that Nyman was told on Friday, March 2nd, that he might not be needed for March 5th. Next, while he was given reasonable notice on March 5th that he was not needed for the 6th, that instruction was reversed on the morning of the 6th when Fairfax told him that he was needed for the Red Lobster job. There is no evidence to justify such abrupt changes to his work schedule. The clear message is that, to the extent that Nyman relied on the income from his job, there was not going to be much. There is little wonder that, two days later, when Fairfax withheld his pay cheque without offering any reason, Nyman, having been told by Davidson before he left on vacation that his cheque had been left with Fairfax, thought they were trying to tell him something. Given that Fairfax had no reason to believe that Nyman would not still be employed the following week, the Board finds the reasons given at the hearing unconvincing; that is, that Nyman had not worked the forty hours covered by the cheque or that he might have owed the respondent money for tool purchases. Finally, on Davidson's own version of the events, when he returned from vacation on March 9th, he criticized Nyman for not showing up for work that day, and on March 5th and 6th while he was away. Since the two latter days are the ones for which Elliott, whom Davidson had left in charge, had told him not to work, that criticism, coming as it did on the heels of the reduction of his income and the holding back of his pay cheque, would be reasonable, additional cause for Nyman to be concerned about the security of his employment and skeptical about Davidson's call two days later telling him to report for work the next day.

51. If there were good business reasons for those actions, they were not given to the Board. Moreover they began immediately after the shop meeting on February 27th, at which Davidson speculated about Nyman's interest in the union and seriously breached sections 65 and 71 of the Act by making it clear to the employees, including Elliott and Fairfax, that their employment security was at risk if the respondent became unionized. Viewed in that context, the Board is satisfied that Davidson, Elliott and Fairfax took those actions because they believed Nyman to be a supporter of the applicant and to make his employment so difficult and unpleasant as to provoke him into quitting. He did quit, and the Board is satisfied that the actions of Davidson, Elliott and Fairfax contributed significantly to Nyman's decision to quit. Therefore, because their actions were motivated by the belief that Nyman supported the union, the Board finds their actions to be a breach of section 65 and subsection 67(a) of the Act.

52. In the result, the Board finds that Kevin Beattie and Claas Nyman were discharged because of the respondent's unfair labour practices contrary to sections 65, 67 and 71 of the Act. Therefore, they continue to be employees of the respondent for purposes of the Act in accordance with subsection 1(2) of the Act and, but for the respondent's unlawful conduct, would have been at work on March 12, 1990 when this application was made. There is no dispute that Beattie would have been at work in the bargaining unit on that date, and the Board so finds. In Nyman's case, the Board must determine whether he would have been employed in the bargaining unit had he been at work on March 12th.

53. In an application for certification under the construction industry provisions of the Act, in order for an employee to be “counted” as employed in the bargaining unit, it is well settled in the Board’s jurisprudence that the employee must actually be at work in the unit on the date of making of the application. Where, as here, the application for certification relates to the industrial, commercial and institutional sector of the construction industry and is made under subsection 146(1) of the Act, the applicant can represent only those employees in the trade which the Minister of Labour has designated the applicant to represent in collective bargaining in the industrial, commercial and institutional sector. For this applicant, that is journeymen and apprentices in the electrical trade, and for that trade, the Board defines the appropriate unit in terms of “all electricians and electricians’ apprentices” in the employ of the respondent. See the unit described at paragraph 7 of this decision. In the circumstances of this application for certification, Nyman was not at work at all on the application date because of the respondent’s unfair labour practices. Therefore, if he is to be counted, the Board must be able to infer reasonably from all of the evidence that, on the application date, he would have been at work as an electrician’s apprentice.

54. The evidence relevant to this issue is set out at paragraphs 30, 31 and 32 of this decision. Having regard to that evidence and the submissions of counsel respecting which work Nyman was performing, the Board makes the following findings of fact. Nyman was registered as an electrician’s apprentice under the Trades Act on February 23, 1990, pursuant to a contract of apprenticeship with the Local Apprenticeship Committee of Central Ontario for the Electrical Trade (“the L.A.C.”) entered into on the same date. The L.A.C. is an employer within the meaning of section 1 of the Trades Act. The respondent had no knowledge of the contract of apprenticeship or of Nyman’s registration under the Trades Act prior to the termination of Nyman’s employment. Prior to and after Nyman’s registration as an electrician’s apprentice, he was employed performing work which falls clearly within the work by which the trade of electrician is defined in clause (b) of section 1 of Regulation 32 under the Trades Act. This work which he did before he was registered included stringing wire, hooking up electrical fixtures, installing receptacles, switches, baseboard electrical heaters and cooling fans. The work which he did after his registration was on the Scarborough Red Lobster job and included helping others pull wire, stringing wire for electrical outlets and pot lights, connecting pot lights, pulling wire through conduits, and strapping conduits to walls and ceilings.

55. In addition, he did the following work which Davidson described as labouring work and which the Board finds is work which is arguably covered by Regulation 32: installing ceiling T-Bars for the support of light fixtures, installing the fixtures and installing light tubes in the fixtures. Finally, he did trenching, which Davidson also considered to be labouring work. He did two to two-and-one-half days of this type of work on the Scarborough Red Lobster job and a few hours on an earlier job. The trenches were for electrical conductor enclosures, or ducts, for putting wiring underground. In the Board’s experience, this type of work is done by construction labourers and by electrical tradesmen. For an example of this type of work and the issue of which of these two trades perform it, see *K-Line Maintenance and Construction Ltd.*, [1979] OLRB Rep. Dec 1185. It is not uncommon for small electrical contractors to assign such work to electrician’s apprentices. Therefore, since Nyman did trenching in conjunction with other electrical work, it would be reasonable to find that he was working in the trade when he was performing that work.

56. When the time spent performing all of the foregoing work is compared with the time he spent on other tasks which Davidson described as labouring work, the Board is satisfied that, for the majority of the time when Nyman was employed by the respondent, he was performing work of the electrical trade, whether before or after his registration as an electrician’s apprentice.

57. Counsel for the respondent and for the objectors argue that, for it to be inferred that

Nyman was employed in the bargaining unit on the date of making of the application, he must be more than an electrician's apprentice registered under the Trades Act that is, he must be employed as an apprentice. In that respect, Nyman did nothing to make the respondent aware that he was party to a contract of apprenticeship and did nothing to establish the day to day reality of that contract. Counsel for the objectors argued more specifically that there must be a contract of employment at common law which included a condition that Nyman was to be employed as an electrician's apprentice. There is no evidence of any meeting of minds between the respondent and Nyman in that respect. Objectors' counsel argues further that the requirement for a common law contract of employment which includes employment as an electrician's apprentice is reinforced by section 14 of the Trades Act which, he contends, requires that Nyman be party to a contract of employment as an electricians' apprentice in order to work in the trade. In addition, respondent counsel argues that the Board should not infer that Nyman would have been employed in the bargaining unit on the application date because he would not have been working as an electrician's apprentice. This is because the Scarborough Red Lobster job, on which he had been working before the termination of his employment, was winding down and most of the respondent's employees were working on it. In those circumstances, he argues, it would make sense that Nyman, who was hired and paid as a labourer and had no prior electrical experience, would have been used to do labouring work.

58. Applicant counsel argued that the question for the Board is whether, on the application date, Nyman would have been doing bargaining unit work for the majority of his time. To answer that question, he submits, the Board must focus on whether the work which he was doing at the material time, was work of the electrical trade and whether he was registered under the Trades Act to perform that work. In that respect, counsel argues, Nyman had met all of the requirements of the Trades Act for registration as an electrician's apprentice and was in fact so registered. His particular employment relationship with the respondent, including whether there was a contract of employment at common law which included a condition that Nyman be employed as an electrician's apprentice, is not relevant to whether he was doing work of the electrical trade and was registered under the Trades Act to do it.

59. With respect to whether Nyman was doing work of the electrical trade at the material time, applicant counsel submits that Nyman had been working on the Scarborough Red Lobster job prior to the termination of his employment performing a variety of work covered by Regulation 32 under the Trades Act for the trade of electrician, and that he had performed similar work on earlier jobs, in each case using the tools of the electrical trade. During the time when he was performing that work on the Scarborough Red Lobster job, he was registered as an electrician's apprentice under the Trades Act. Applicant counsel submits also that any question about what consequences for the respondent or Nyman, if any, might flow from the fact that the respondent was unaware of Nyman's contract of apprenticeship was a matter of enforcement of the Trades Act, and not any issue for the *Labour Relations Act*. Nor is it the Board's responsibility to enforce the Trades Act, counsel submits.

60. The parties did not refer the Board to any legal authorities for their submissions on Nyman's status, other than their references to the Trades Act, and its regulations.

61. The trade of electrician is designated as a certified trade under the section 11 of the Trades Act. In order to be lawfully employed in that trade under the Trades Act, a person must either hold a certificate of qualification in the trade or be an apprentice in the trade. The Board is not responsible for enforcing provisions of the Trades Act, but, being a statute of general application, whenever the Board is determining an application for certification under subsection 146(1) of the Act involving a specific certified trade, the Board looks to the Trades Act as a guide to decid-

ing whether a person is employed in that trade and is to be “counted” in a bargaining unit confined to that trade. See *O. J. Pipelines Incorporated*, [1989] OLRB Rep. Sept 976. When the Board decides who is to be counted, it is discharging its mandate under subsection 7(1) of the Act to “...ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union...” at the relevant time. Therefore, when the Board is dealing with a specific, certified trade, as here, it does not include in the unit any person who is not qualified pursuant to the requirements of the Trades Act to work in the trade even though the person may have been performing the work of the trade. One of the factors which the Board considers when deciding whether a person is an apprentice qualified in the certified trade is whether the person is registered under the Trades Act as an apprentice in the trade. If the person is a registered apprentice in the trade, then what is important and relevant to deciding whether the person is to be counted in the unit is the work which the person was doing for the employer at the time material to the application. The Board does not, and ought not, consider whether a registered apprentice is also under a contract of employment at common law which includes a condition that the person be employed as an apprentice.

62. Nyman is registered as an electrician’s apprentice and the Board has found that he has spent the majority of his time, both before and after registration, employed performing work of the electrician trade for the respondent. The Board disagrees with respondent counsel’s argument that it would not be reasonable to infer that Nyman would have been so employed on the date of making of the application because Nyman would have been doing labouring work on the Scarborough Red Lobster job. Most of the work which Davidson had described as labouring work has been found by the Board to be work of the electrician trade. Even if he was hired as a labourer, the evidence as a whole about the work he performed for the respondent suggests to the Board that it is more likely that he would have spent the majority of his time performing work of the electrical trade, and the Board so finds. Therefore Nyman is an employee in the bargaining unit described at paragraph 7.

63. The list of employees is now settled. The respondent’s employees who were employed in the bargaining unit on the date of making of this application are Duane Elliott, Ted Pitura, Kevin Beattie and Claas Nyman. Two of them were members of the applicant within the meaning of the Act on March 28, 1990, the terminal date fixed for this application. Therefore, but for section 8 of the Act, the only way for the applicant to be certified would be to win a representation vote. The Board turns now to the application of that section to the facts of this application.

64. The Board discussed the purpose of section 8 of the Act and the conditions required to be met in order for a union to be certified under the section in *Trulite Industries Limited*, [1983] OLRB Rep. May 821, the only authority referred to the Board respecting the section 8 application. The Board stated at paragraph 19:

19. Certification without a vote under section 8 was designed as a deterrent to illegal employer interference in union organizing campaigns, and a device to provide a meaningful remedy in those cases when the employer’s interference undermines his employee’ statutory rights, and, in addition, precludes the Board from undertaking its usual determination of employee wishes through a representation vote or an assessment of the union’s membership evidence. In other words, section 8 is a kind of “second best” solution, to be applied where the employer’s misconduct not only frustrates the union’s organizing drive, but also impairs the Board’s ability to ascertain whether the majority of the employees do or do not wish to be represented by a union. In order for a union to be certified under section 8 of the Act, the Board must be satisfied that:

1. the respondent employer has contravened the Act;
2. the contravention is of such nature that the true wishes of the employees are not likely to be ascertained in a representation vote or otherwise; and

3. the applicant union has membership support adequate for collective bargaining.

65. The Board has determined that the respondent has committed serious breaches of sections 65, 67 and 71 of the Act, including the discharge of Beattie a few days after the shop meeting in which Davidson had made it clear to Beattie and to the other employees that membership in the union and employment with the respondent were incompatible. The Board has stated previously that, where an employee who is believed to be a union supporter has been discharged, there can be no more serious threat to the job security of those left behind. This is particularly so where, as here, there are only a few employees who on any day might be in the bargaining unit. In this case, there was the additional threat to the employees' job security in Davidson's statements that the respondent would close if the union came in. Nyman had started talking to employees two weeks before the shop meeting. He stated that the employees to whom he had spoken showed a sincere interest in the union. Beattie had been alluding generally to the union in comments to employees during January and February and then, immediately after the February 27th shop meeting, he started to explain the union to employees. He succeeded in developing an interest in some employees for more information on the union and what it could do for them. A few days later he was gone, and a week later, so was Nyman. It is extremely unlikely in those circumstances that the applicant would have been able to develop enough support after their departures to be certified without a vote. In face of the respondent's contraventions of the Act, it is just as unlikely that the true wishes of the employees would be ascertained by a representation vote, even though the applicant has demonstrated enough support to be entitled to a representation vote. In these circumstances, the Board is satisfied that the applicant has demonstrated that it has adequate support for collective bargaining.

66. Accordingly, the Board finds that, on all of the evidence before it, the applicant is entitled to and should be certified pursuant to section 8 of the *Labour Relations Act* without the taking of a representation vote. Since, in final argument, the applicant did not request any other remedy for the respondent's violations of the Act, the Board makes no other remedial order.

67. Section 146(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate to a successful applicant under subsection (1):

.... the board shall certify the trade unions as the bargaining agent of the employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 146(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 5 above in respect of all electricians and electricians' apprentices in the employ of Wm. J. Davidson Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

68. Further, pursuant to section 146(2) of the Act, a certificate will issue to the applicant trade union in respect of all electricians and electricians' apprentices in the employ of Wm. J. Davidson Electric Inc. in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institu-

tional sector, save and except non-working foremen and persons above the rank of non-working foreman.

69. In summary, having found that the respondent breached sections 65, 67 and 71 of the *Labour Relations Act*, the Board has exercised its discretion under section 8 of the Act to certify the applicant and has issued certificates to it pursuant to subsection 146(2) of the Act.

CASE LISTINGS DECEMBER 1991

	PAGE
1. Applications for Certification	1
2. Applications for First Contract Arbitration	12
3. Applications for Declaration of Related Employer.....	12
4. Sale of a Business	13
5. Applications for Declaration Terminating Bargaining Rights.....	14
6. Applications for Declaration of Unlawful Strike (Construction Industry)	14
7. Complaints of Unfair Labour Practice	14
8. Applications for Consent to Early Termination of Collective Agreement	17
9. Financial Statement	17
10. Jurisdictional Disputes.....	17
11. Applications for Determination of Employee Status.....	18
12. Complaints under the Occupational Health and Safety Act	18
13. Construction Industry Grievances	18
14. Applications for Reconsideration of Board's Decision	22

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2540-90-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Volkswagen Canada Inc. (Respondent) v. Ralph Grasmeyer (Objectors)

Unit: "all employees of the respondent in the City of Barrie save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period" (411 employees in unit) (*Having regard to the agreement of the parties*)

2871-90-R; 2872-90-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Applicant) v. Captain Developments Limited c.o.b. as Sheraton Parkway Hotel (Respondent)

Unit #1: "all employees of the Respondent at the Sheraton Parkway Hotel in Richmond Hill save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (81 employees in unit)

Unit #2: "all employees of the Respondent at the Sheraton Parkway Hotel in Richmond Hill regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (125 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0464-91-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Angelica Uniforms of Canada Ltd. (Respondent) v. Carmela Mongillo (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and forepersons, persons above the rank of supervisor and foreperson, office and sales staff, design and quality control staff, inspectors, persons employed for not more than 24 hours per week and students employed during the school vacation period" (121 employees in unit) (*Having regard to the agreement of the parties*)

1427-91-R: United Steelworkers of America (Applicant) v. Conix Canada Inc., c.o.b. as Tycos Tool & Die, Conix Canada Inc. c.o.b. as Tycos Tool & Die (Respondents)

Unit: "all employees of the respondent in the City of Vaughan, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (90 employees in unit) (*Having regard to the agreement of the parties*)

2004-91-R: Ontario Public Service Employees Union (Applicant) v. Timmins and District Hospital. L'Hopital de Timmins et du District (Respondent) v. United Steelworkers of America (Intervener) v. Madeleine Boznar, Heather Danylchuk (Objectors)

Unit: "all paramedical and technical employees of the respondent in the City of Timmins, save and except supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as of September 17, 1991" (112 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2147-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Mir-Cor Sewer Contracting Inc. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

2159-91-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Loeb I.G.A. Beaverbrook (Respondent)

Unit: “all employees of the respondent at 2 Beaverbrook Road, Kanata, save and except store owner, store manager Loeb Fresh, store manager Loeb Ready, Store Manager Grocery, persons above the rank of store manager Loeb Fresh, store manager Loeb Ready, store manager Grocery, and office and clerical staff” (110 employees in unit) (*Having regard to the agreement of the parties*)

2304-91-R: Service Employees Union, Local 183 Sisters of St. Joseph of the Diocese of Peterborough (Applicant) v. Sisters of St. Joseph of the Diocese of Peterborough (Respondent)

Unit: “all lay employees regularly employed for not more than 24 hours per week and students employed during the school vacation period of Sisters of St. Joseph of the Diocese of Peterborough at 1545 Monaghan Road, Peterborough save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses” (16 employees in unit) (*Having regard to the agreement of the parties*)

2351-91-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Applied Development Inc. c.o.b. as Applied Electric Co. (Respondent) v. Group of Employees (Objectors)

Unit: “all electricians and electricians’ apprentices in the employ of respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2391-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Trenton Gravel Products, a division of George Wimpey Canada Limited (Respondent)

Unit: “all employees of the respondent working at and out of Covert’s Pit in the Township of Richmond, County of Lennox and Addington and Alyea Pit, Murray Township, Northumberland County, save and except non-working foremen, persons above the rank of non-working foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2416-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Dufferin Construction Company (Respondent)

Unit: “all construction labourers in the employ of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2419-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Trenton Gravel Products, a Division of George Wimpey Canada Limited (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construc-

tion industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman, and all employees of the respondent in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman, and all construction labourers and truck drivers in the employ of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

2500-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Starline Masonry Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2532-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Newline Bricklayers (Respondent)

Unit: “bricklayers, bricklayers apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

2578-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Jarvis Design and Display Ltd. (Respondent)

Unit: “all employees of the respondent in the Township of Oxford-on-Rideau, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2621-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Stouffville Foods Inc. c.o.b. as Stouffville IGA (Respondent)

Unit: “all employees of the respondent in the Town of Stouffville, save and except assistant manager, persons above the rank of assistant manager, meat manager, office and clerical employees, persons regularly

employed for not more than 24 hours per week and students employed during the school vacation period' (6 employees in unit) (*Having regard to the agreement of the parties*)

2633-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. Stormont, Dundas and Glengarry County Board of Education (Respondent)

Unit: "All employees of the Respondent in the City of Cornwall employed as Professional Student Services Personnel, save and except superintendent, persons above the rank of superintendent and persons for whom any trade union held bargaining rights as of November 13, 1991" (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2634-91-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Restaunomics Services Inc. c.o.b. OPSEU Headquarters (Respondent)

Unit: "all employees of the respondent at 100 Lesmill Road, Don Mills, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff and security staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

2635-91-R: Ontario Public Service Employees Union (Applicant) v. Sydenham District Hospital (Respondent) v. Sandra J. Costantin (Objectors)

Unit #1: "All paramedical employees of the respondent in the Town of Wallaceburg, save and except supervisors and persons above the rank of supervisor, office and clerical employees, students employed in a co-operative training program, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights on the date of application November 8, 1991" (8 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "All paramedical employees of the Respondent regularly employed for not more than 24 hours per week, students employed during the school vacation period in the Town of Wallaceburg, save and except supervisors and persons above the rank of supervisor, office and clerical employees, students employed in a co-operative training program and persons for whom any trade union held bargaining rights on the date of application November 8, 1991" (17 employees in unit) (*Having regard to the agreement of the parties*)

2636-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. B & J Masonry (Respondent)

Unit #1: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2637-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. ACDMC Group Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the

employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

2654-91-R: Canadian Union of Public Employees (Applicant) v. Westmount Retirement Home (Sudbury) (Respondent)

Unit #1: “All employees of the respondent in the Regional Municipality of Sudbury save and except supervisors, persons above the rank of supervisor and office and clerical employees” (24 employees in unit) (*Having regard to the agreement of the parties*)

2655-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Casabella Masonry Ltd. (Respondent)

Unit #1: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2659-91-R: Energy and Chemical Workers Union (Applicant) v. Servico Limited (Respondent)

Unit: “All employees of the respondent at its 1695 Bayly St. Car Wash in the Town of Pickering, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

2671-91-R: Retail, Wholesale And Department Store Union, AFL:CIO:CLC (Applicant) v. The Brick Warehouse Corporation (Respondent)

Unit: “all employees of the respondent in the City of Burlington, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (46 employees in unit) (*Having regard to the agreement of the parties*)

2677-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Casatta Ltd., c.o.b. as Casatta/Peel (Respondent)

Unit #1: “all employees of the respondent in the City of Brampton, save and except program supervisor, persons above the rank of program supervisor and persons regularly employed for not more than 24 hours per

week and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the City of Brampton, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except program supervisor and persons above the rank of program supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

2693-91-R: Energy and Chemical Workers Union (Applicant) v. Servico Limited/Service Limited (Respondent)

Unit: “All employees of the respondent at its 1695 Bayly St. Car Wash in the Town of Pickering, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

2703-91-R: Office and Professional Employees International Union (Applicant) v. Minto Counselling Centre (Respondent)

Unit: “all employees of the respondent in the Towns of Cochrane and Iroquois Falls and the Township of Black River-Matheson, save and except Administrative Secretary and Executive Director” (10 employees in unit) (*Having regard to the agreement of the parties*)

2707-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Murphy Distributing (Sarnia) Limited (Respondent)

Unit: “all office and clerical employees of the respondent in the City of Sarnia, save and except manager and persons above the rank of manager and salesperson” (4 employees in unit) (*Having regard to the agreement of the parties*)

2710-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Malfara & Sons Excavating & Contracting Inc. (Respondent)

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

2713-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Bedcolab Limited (Respondent)

Unit #1: “All construction labourers and all employees engaged in cement finishing, waterproofing or restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing or restoration work in the employ of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2725-91-R: Canadian Union of Public Employees (Applicant) v. Manuel Soares Janitorial Services (Respondent)

Unit: “all employees of Manuel Soares Janitorial Services Ltd. at Tufford Nursing Home in the City of St.

Catharines, save and except supervisors and persons above the rank of supervisor” (19 employees in unit) (*Having regard to the agreement of the parties*)

2762-91-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the County of Lanark (Respondent)

Unit #1: “all office, clerical and social service employees of the respondent in the County of Lanark, save and except supervisors, persons above the rank of supervisor, persons employed at the respondent’s Homes for the Aged, persons employed on a contract basis, persons employed for not more than 24 hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of November 21, 1991” (31 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all office, clerical and social services employees regularly employed for not more than 24 hours per week, persons employed on a contract basis and students employed during the school vacation period in the County of Lanark, save and except supervisors, persons above the rank of supervisor, persons employed at the respondent’s Homes for The Aged and persons for whom any trade union held bargaining rights as of November 21, 1991” (6 employees in unit) (*Having regard to the agreement of the parties*)

Unit #3: “all office and clerical employees of the respondent employed at the respondent’s Homes for The Aged in the county of Lanark, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of November 21, 1991” (6 employees in unit) (*Having regard to the agreement of the parties*)

2766-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Taylor Masonry Ltd. (Respondent)

Unit: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in all sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2779-91-R: The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Thomson Newspapers Company Limited (Respondent)

Unit: “all employees of the respondent in its Sudbury Star division in the advertising department in the Regional Municipality of Sudbury save and except advertising manager, promotions manager, classified supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (18 employees in unit) (*Having regard to the agreement of the parties*)

2780-91-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Lakehead District Roman Catholic Separate School Board (Respondent)

Unit: “all professional student services personnel employed by the Lakehead District Catholic Separate School in the City of Thunder Bay, save and except superintendent, persons above the rank of superintendent, chaplain, student support personnel, persons regularly employed for not more than 24 hours per week and persons for whom any trade union held bargaining rights as of the date application, November 25, 1991” (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2781-91-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Lake Superior Board Of Education (Respondent)

Unit: “all teacher aides and attendance counsellors employed by the Lake Superior Board of Education, save and except superintendent, persons above the rank of superintendent and persons for whom a trade union held bargaining rights as of the date of application November 25, 1991” (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2799-91-R: Ontario Public Service Employees Union (Applicant) v. Kennedy House Youth Services Inc. (Respondent)

Unit: “all employees of the respondent in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period” (31 employees in unit) (*Having regard to the agreement of the parties*)

2800-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Rosegarden General Masonry Construction (Respondent)

Unit #1: “Bargaining Unit No. 1 (a) all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the Respondent in the industrial, commercial and institutional sector of the Construction Industry in the Province of Ontario, and all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the Respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2829-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. The Brick Warehouse Corporation (Respondent)

Unit: “all employees of the respondent in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (27 employees in unit) (*Having regard to the agreement of the parties*)

2839-91-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Peterson Spring (Windsor Plant) A Division of Peterson Spring of Canada Limited (Respondent)

Unit: “All employees of the Respondent in the City of Windsor, save and except supervisors, those above the rank of supervisor, office and sales staff, and persons regularly employed for not more than 24 hours per week” (28 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2845-91-R: Hotels, Clubs, Restaurants, Taverns, Employees Union Local 261 (Applicant) v. Sodexho Canada Inc. (Respondent)

Unit: “All employees of Sodexho Canada Inc. at the Confederation Heights Complex in the City of Ottawa, save and except Assistant Managers and Executive Chefs and persons above the rank of Assistant Manager and Executive Chef and office staff” (20 employees in unit) (*Having regard to the agreement of the parties*)

2856-91-R: United Steelworkers of America (Applicant) v. Timmins and District Hospital L’Hopital de Timmins et du District (Respondent)

Unit #1: “all office and clerical employees of the Timmins and District Hospital L’Hopital de Timmins et du District at its Porcupine facility, Bruce Avenue, South Porcupine, save and except supervisors, persons above the rank of supervisor, secretary to the Executive Director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit)

Unit #2: “all office and clerical employees of the Timmins and District Hospital L’Hopital de Timmins et du District at its Porcupine facility, Bruce Avenue, South Porcupine regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

2875-91-R: Hotels, Clubs, Restaurants, Taverns, Employees Union, Local 261 (Applicant) v. Versabec Inc. (Respondent)

Unit: “all employees of Versabec Inc. at Ottawa University, Ottawa, Ontario, save and except managers, persons above the rank of manager, office and clerical staff and persons regularly employed for not more than 24 hours per week” (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2878-91-R: Ontario Public Service Employees Union (Applicant) v. The Religious Hospitallers of Saint Joseph of the Hotel Dieu of Kingston (Respondent)

Unit: “All radiological technologists, cardiology technicians, autopsy technologists, operating room technicians, respiratory technologists, dark room technicians, nuclear medicine technologists, audiology technicians, ENG technicians, electro-encephalographists (EEG) technicians and pharmacy technicians regularly employed by the Respondent in the City of Kingston for not more than 24 per week and students employed during the summer vacation period save and except, assistant chief radiological technologists, cardiological charge technicians, chief respiratory technologists, radiological clinical instructors and persons above these ranks, undergraduate pharmacy students and office and clerical staff, X-Ray aides, morgue attendants, operating room aides, and persons for whom any trade union held bargaining rights as of November 28, 1991” (24 employees in unit) (*Having regard to the agreement of the parties*)

2889-91-R: IWA - Canada (Applicant) v. Alcarb Resources Inc. (Respondent)

Unit: “All employees of Alcarb Resources Inc. in the City of Hamilton save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

2909-91-R: Ontario Public Service Employees Union (Applicant) v. The Children’s Aid Society of the County of Perth (Respondent)

Unit: “all office and clerical employees of The Children’s Aid Society of the County of Perth, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

2922-91-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Timiskaming Board of Education (Respondent)

Unit: “all Teacher Assistants employed by the Timiskaming Board of Education in the District of Timiskaming, save and except Superintendents, persons above the rank of Superintendent and persons for whom any trade union held bargaining rights as of December 6, 1991” (38 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2205-91-R: United Steelworkers of America (Applicant) v. The Corporation of the Township of Red Lake (Respondent)

Unit: “all employees of the respondent in the Township of Red Lake, save and except supervisors, persons above the rank of supervisor, and Executive Secretary to the Clerk” (35 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons listed as eligible	28
Number of persons who cast ballots	23
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	6

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2407-91-R: Ontario Public Service Employees Union (Applicant) v. St. John’s Training School for Boys (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Township of Uxbridge, save and except supervisors, persons

above the rank of supervisor, office and clerical staff, and persons regularly employed for not more than 24 hours per week ” (103 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	104
Number of persons who cast ballots	91
Number of ballots marked in favour of applicant	49
Number of ballots marked against applicant	42

Applications for Certification Dismissed Without Vote

3140-88-R: Canadian Paperworkers Union (Applicant) v. Boise Cascade Canada Ltd.; L & N Enterprises; R & W Timber Ltd.; Querel Gravel and Lumber Ltd.; Devlin Timber Co. Ltd.; Therrien Forest Products Ltd.; Dave Bert General Contractors Ltd.; Regional Logging Industries (1979) Ltd.; 432919 Ontario Inc. and Quinella Timber Ltd., Clarke Anderson (Respondents) (90 employees in unit)

2276-90-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Al White Construction Co. Ltd. (Respondent) (7 employees in unit)

1220-91-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. The Hudson’s Bay Company/Simpsons Ltd. and Sears Canada Inc. (Respondents) (32 employees in unit)

2861-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ashbridge Electrical Contractors Limited (Respondent) (9 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2464-91-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Simcoe County Association for the Physically Disabled (Respondent)

Unit: “all employees of the respondent in the County of Simcoe, save and except supervisors, persons above the rank of supervisor, drivers, dispatchers, office and clerical staff” (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	36
Number of persons who cast ballots	32
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	16

2296-91-R: United Food and Commercial Workers International Union, CLC-AFL-CIO (Applicant) v. 839778 Ontario Inc. c.o.b. as LOEB IGA Preston (Respondent)

Unit: “all employees of the respondent in the City of Cambridge, save and except department managers, persons above the rank of department manager, head cashier, office and clerical staff” (130 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	135
Number of persons who cast ballots	104
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	73

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0688-91-R: International Brotherhood of Electrical Workers, Local Union 894 (Applicant) v. Carlo’s Electric Limited (Respondent) v. Carlo’s Electric Employees Association (Intervener)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry, except the industrial, commercial and institutional sector, in the Regional Municipality of Durham (except for the Towns

of Ajax and Pickering) the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman” (32 employees in unit)

Number of persons listed as eligible	27
Number of persons who cast ballots	25
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	23

2257-91-R: National Automobile, Aerospace And Agricultural Implement Workers Union Of Canada (C.A.W. - Canada) (Applicant) v. Joh Rubber Investments Limited Partnership (Respondent) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Intervener) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Town of Leamington, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period” (35 employees in unit) (*Having regard to the agreement of the parties*)

Number of person listed as eligible	34
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	18

Applications for Certification Withdrawn

1704-90-R: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Environmental Abatement Services Inc. (Respondent) v. Labourers’ International Union Of North America, Local 506 (Intervener)

0082-91-R: Labourers’ International Union of North America Local 527 (Applicant) v. Les Planchers De Ciment M. Candussi Lee (Respondent) v. Group of Employees (Objectors)

1076-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Sault College of Applied Arts and Technology (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 446, Ontario Public Service Employees Union (Interveners)

1251-91-R: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Sault College of Applied Arts and Technology (Respondent) v. Labourers’ International Union of North America, Ontario Provincial District Council and Labourers’ International Union of North America, Local 1036, Ontario Public Service Employees Union (Interveners)

1861-91-R: Service Employees Union Local 268 affiliated with the A.F. of L., C.I.O., and C.L.C. (Applicant) v. Roman Catholic Bishop of Thunder Bay (Respondent)

1938-91-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Local 129 (Applicant) v. Theatre Aquarius Inc. (Respondent)

2185-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Goodfellow Construction Inc. (Respondent)

2330-91-R: Operative Plasterers’ and Cement Masons International Association of the United States and Canada Local Union No: 124 Ottawa, Ontario (Applicant) v. Les Construction Benoit Larrivee Ltd. (Respondent)

2402-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. T.C. Bricklayers Inc. (Respondent)

2638-91-R: Labourers' International Union of North America, Local 493 (Applicant) v. Reichhold Limited (Respondent)

2670-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Condominium Corporation No. 821 (M.T.C.C. No. 821) (Respondent)

2730-91-R; 2731-91-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Norbro Holdings Ltd. c.o.b. Best Western Parkway Inn (Respondent)

2734-91-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC (Applicant) v. Goodyear Canada Inc. (Respondent)

2755-91-R: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union. (Applicant) v. Holiday Inns of Canada Ltd. (Respondent)

2791-91-R: International United Plant Guard Workers of America Local 1962 (Applicant) v. Ford Motor Company (Respondent)

2823-91-R: Strathroy District Ambulance Service Employee's Association; Parkhill Local (Applicant) v. North Middlesex Ambulance Service (Respondent)

2888-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Matthews Contracting Inc. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1567-91-FC: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Romatt Custom Woodwork Inc. (Respondent) (*Granted*)

2436-91-FC: International Union of Operating Engineers, Local 772 (Applicant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3141-88-R: Canadian Paperworkers Union (Applicant) v. Boise Cascade Canada Ltd., L & N Enterprises, R & W Timber Ltd., Querel Gravel And Lumber Ltd., Devlin Timber Co. Ltd., Therrien Forest Products Ltd., Dave Bert General Contractors Ltd., Regional Logging Industries (1979) Ltd., 432919 Ontario Inc., Quinella Timber Ltd. (Respondents) (*Dismissed*)

1900-90-R: Labourers' International Union of North America, Local 506 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Environmental Abatement Services Inc., Delsan Demolition Limited (Respondents) v. International Brotherhood of Painters and Allied Trades, Local 1891 (Intervener) (*Withdrawn*)

3220-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Under Budget Construction Managers Limited, Jeti Heating Systems Company Limited (Respondents) (*Granted*)

3341-90-R: International Brotherhood of Electrical Workers, Local 773, Sheet Metal Workers' International Association, Local 235, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552 (Applicants) v. Vollmer & Associates Contractors Limited, H. Pare Electric, Division Of Vollmer & Associates Contractors Limited, Bannon Sheet Metal, Division of Vollmer & Associates Contractors Limited, Cardinal Air Conditioning Ltd. (Respondents) (*Withdrawn*)

0087-91-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Cooper Electric Limited, M.T.C. Electric Limited (Respondents) (*Withdrawn*)

0982-91-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. L.K. Interior Contracting Ltd. and, 754762 Ontario Inc. a.k.a Tri-County Contracting, and 666017 Ontario Inc. (Respondents) (*Granted*)

1182-91-R: United Brotherhood of Carpenters and Joiners of America, Local Union 18 (Applicant) v. 737049 Ontario Limited c.o.b. D'Luxe Drywall (1987), Stoney Creek Drywall Ltd., Saltfleet Drywall Inc. (Respondents) (*Withdrawn*)

1882-91-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Jordon Construction Management Ltd. and/or Murray Sklar Investments Inc., Fircon Investments Ltd. and/or Jordan Construction Management Inc. (Respondents) (*Withdrawn*)

2127-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. John Wheelwright Limited and, Wheelwright Construction Inc. (Respondents) (*Withdrawn*)

2776-91-R: Teamsters Local Union 938 (Applicant) v. Cornelius Manufacturing Company Limited (Respondent) (*Withdrawn*)

2852-91-R: International Union, Plant Guard Workers of America, Local 1962 (Applicant) v. Ford Motor Company, Burns International Security Services Limited (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0087-90-R: International Brotherhood Of Electrical Workers, Local 105 (Applicant) v. Cooper Electric Limited, M.T.C. Electric Limited (Respondents) (*Withdrawn*)

1900-90-R: Labourers' International Union of North America, Local 506 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Environmental Abatement Services Inc., Delsan Demolition Limited (Respondents) v. International Brotherhood of Painters and Allied Trades, Local 1891 (Intervener) (*Withdrawn*)

3220-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Under Budget Construction Managers Limited, Jeti Heating Systems Company Limited (Respondents) (*Granted*)

3341-90-R: International Brotherhood of Electrical Workers, Local 773, Sheet Metal Workers' International Association, Local 235, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552 (Applicants) v. Vollmer & Associates Contractors Limited, H. Pare Electric, Division Of Vollmer & Associates Contractors Limited, Bannon Sheet Metal, Division of Vollmer & Associates Contractors Limited, Cardinal Air Conditioning Ltd. (Respondents) (*Withdrawn*)

0983-91-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. L.K. Interior Contracting Ltd. and, 754762 Ontario Inc. a.k.a Tri-County Contracting, and 666017 Ontario Inc. (Respondents) (*Granted*)

1183-91-R: United Brotherhood of Carpenters and Joiners of America, Local Union 18 (Applicant) v. 737049 Ontario Limited c.o.b. D'Luxe Drywall (1987), Stoney Creek Drywall Ltd., Saltfleet Drywall Inc. (Respondents) (*Withdrawn*)

1881-91-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Jordan Construction Management Ltd. and/or Murray Sklar Investments Inc., Fircon Investments Ltd. and/or Jordan Construction Management Inc. (Respondents) (*Withdrawn*)

2128-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. John Wheelwright Limited and, Wheelwright Construction Inc. (Respondents) (*Withdrawn*)

2776-91-R: Teamsters Local Union 938 (Applicant) v. Cornelius Manufacturing Company Limited, QBD Cooling Systems Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2489-91-R: Karen E. Gregus (Applicant) v. United Food and Commercial Workers Local 175/633 (Respondent) v. Abbott Laboratories Ltd. (Intervener) (*Withdrawn*)

2535-91-R: George Moody (Applicant) v. Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 49 (London) Ontario (Respondent) v. Webster Air Equipment (Intervener) (11 employees in unit) (*Dismissed*)

2601-91-R: Rosetta Luciani (Applicant) v. The Hotel Employees: Restaurant Employees Union, Local 75 of the Hotel Employees, Restaurant Employees International Union (Respondent) v. Cara Operations Limited (Intervener) (850 employees in unit) (*Dismissed*)

2611-91-R: Jeff White, Chris Cormack, Dennis Morrison, Dwayne Killam (Applicant) v. Local 232, United Rubber, Cork, Linoleum and Plastics, Worker's of America (Respondent) v. Goodyear Canada Inc. (Intervener) (*Withdrawn*)

2648-91-R: Keith R. Humphrys on behalf of the plant workers (Applicant) v. United Steel Workers of America (Respondent) (7 employees in unit) (*Granted*)

2828-91-R: The Employees of Cashway Building Centres Niagara Falls Division (Applicant) v. Retail, Wholesale and Department Store Union and it's Local 414 (Respondent) v. Cashway Building Centre (Intervener) (11 employees in unit) (*Granted*)

2881-91-R: Craig Lauritzen and Warehouse and Service Personnel (Applicant) v. International Brotherhood of Teamsters Union (Respondent) v. SEB Canada Inc. (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3222-90-U: The Electrical Trade Bargaining Agency Of The Electrical Contractors Association Of Ontario, Electrical Contractors Association Of Toronto (Applicants) v. The International Brotherhood of Electrical Workers, Local 353 (Respondent) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0768-90-U: John Kohut (Complainant) v. National Automobile, Aerospace And Agriculture Implement Workers Union Of Canada (C.A.W. - Canada) and its Local 303 (Respondent) (*Dismissed*)

2059-90-U: Leonard Ojha (Complainant) v. C.A.W. Local 112 National Union, United Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada) Local 112 (Respondent) (*Dismissed*)

2448-90-U: International Association of Machinists and Aerospace Workers (Complainant) v. D.D.M. Plastics Inc. (Respondents) (*Dismissed*)

2609-90-U: Jack Hallowell (Complainant) v. Perfect Metro Cleaners #793038 Ltd. Local 183 Labourers' International Union of North America (Respondent) (*Dismissed*)

2749-90-U: Robert E. Kemp (Complainant) v. C.A.W. National Union - Toronto,, C.A.W. Local Union - Oshawa (Respondents) (*Dismissed*)

2759-90-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Complainant) v. ITT Industries of Canada Ltd. c.o.b. as Sheraton Parkway Hotel (Respondent) (*Withdrawn*)

3223-90-U: The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Electrical Contractors Association of Toronto (Complainants) v. The International Brotherhood of Electrical Workers, Local 353, Joe Fashion, Bob Gill, Bill Martindale (Respondents) (*Dismissed*)

0981-91-U: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Complainant) v. L.K. Interior Contracting Ltd. , and 754762 Ontario Inc. a.k.a Tri-County Contracting (Respondents) (*Granted*)

1145-91-U: The Canadian Union of Public Employees, Local 10 (Complainant) v. Corporation of the City of York (Respondent) (*Withdrawn*)

1207-91-U: Mario Aristodemo (Complainant) v. Toronto Joint Board Amalgamated Clothing and Textile Workers (Respondent) (*Dismissed*)

1221-91-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Complainant) v. The Hudson's Bay Company, Sears Canada Inc., Simpsons Ltd. (Respondents) (*Withdrawn*)

1334-91-U: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1036 (Complainants) v. Sault College of Applied Arts and Technology (Respondent) (*Withdrawn*)

1359-91-U: London and District Service Workers' Union, Local 220 (Complainant) v. Country Terrace Nursing Home (Respondent) (*Withdrawn*)

1373-91-U: Leonard Menard (Complainant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 (Respondent) (*Withdrawn*)

1566-91-U: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1036 and Lewis Weston (Complainants) v. Louis Parent (Respondent) (*Withdrawn*)

1770-91-U: United Steelworkers Of America (Complainant) v. Conix Canada Inc. c.o.b as Tycos Tool & Die (Respondent) (*Withdrawn*)

1911-91-U; 2002-91-U; 2129-91-U: United Food and Commercial Workers International Union (Complainant) v. John Howard Society Regional Municipality of Waterloo (Respondent) (*Withdrawn*)

2142-91-U: Hotel and Restaurant Employees and Bartenders Union, Local 604 affiliation A.F. of L., CIO and CLC (Complainant) v. 736207 Ontario Limited, carrying on business as Walsh's (Respondent) (*Withdrawn*)

2146-91-U: Retail Wholesale and Department Store Union AFL:CIO:CLC: (Complainant) v. Conchan Foods Ltd. C.O.B. As Chi-Chi'S Mexican Restaurant, Coopers And Lybrand (Respondents) (*Withdrawn*)

2161-91-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 129 (Complainant) v. Theatre Aquarius Inc. (Respondent) (*Withdrawn*)

2286-91-U: London And District Service Workers' Union, Local 220 (Complainant) v. Rosewood Manor (Respondent) (*Withdrawn*)

2293-91-U: Charles S. Hutchings, Anthony Trimm (Complainants) v. Energy and Chemical Workers Union, Eric Batten -Nat'l Rep. , Pre-Con Co. (Respondents) v. Energy & Chemical Workers Union, Local 424 (Intervener) (*Withdrawn*)

2329-91-U: Service Employees' Union, Local 210 (Complainant) v. Chateau Park Nursing Home (Respondent) (*Withdrawn*)

2393-91-U: International Brotherhood of Electrical Workers, Local 804 (Complainant) v. Applied Development Inc. c.o.b. as Applied Electric (Respondent) (*Withdrawn*)

2430-91-U: Franklyn Brown (Complainant) v. Chestnut Park Hotel (Respondent) (*Withdrawn*)

2431-91-U: Franklyn Brown (Complainant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) (*Withdrawn*)

2442-91-U: Teamsters, Chauffeurs, Warehousemen And Helpers Local Union No. 141 (Complainant) v. Laidlaw Environmental Services Ltd. (Respondent) (*Withdrawn*)

2443-91-U: Service Employees Union, Local 210 (Complainant) v. The Salvation Army Grace Hospital (Respondent) (*Withdrawn*)

2453-91-U: Metropolitan Toronto Sewer and Watermain Contractors Association (Complainant) v. Arnott Construction Ltd., The Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Union Labourers' International Union of North America, Local 183 (Respondents) (*Granted*)

2457-91-U: International Association of Machinists and Aerospace Workers, Local Lodge 1703 (Complainant) v. Walterscheid Agmaster Inc. (Respondent) (*Withdrawn*)

2460-91-U: Michael Peter Fantasia (Complainant) v. C.A.W. Local 29 (Respondent) (*Withdrawn*)

2467-91-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Complainant) v. Anglo Oriental Limited (Respondent) (*Withdrawn*)

2496-91-U: Henry Watkins (Complainant) v. Intelligarde International Inc. and, The Brick Warehouse Corporation (Respondents) (*Withdrawn*)

2507-91-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Complainant) v. Loeb I.G.A. Beaverbrook (Respondent) (*Withdrawn*)

2553-91-U: Suzanne Morin (Complainant) v. Western Ontario Joint Board Amalgamated Clothing and Textile Workers' Union Local 573 (Respondent) (*Withdrawn*)

2605-91-U: Hotel and Restaurant Employees and Bartenders' Union, Local 604 (Complainant) v. 736207 Ontario Limited, c.o.b. as Walsh's (Respondent) (*Withdrawn*)

2610-91-U: Arthur Thomas Eagles (Complainant) v. York University Staff Association (Respondent) (*Withdrawn*)

2647-91-U: James Gagnon (Complainant) v. I.W.& S. Ferrous Limited (Respondent) (*Withdrawn*)

2697-91-U: United Food and Commercial Workers International Union, Local 175 (Complainant) v. LOEB Princess Street (Respondent) (*Withdrawn*)

2714-91-U: Energy And Chemical Workers Union (Complainant) v. Sandoz Canada Inc. (Respondent) (*Withdrawn*)

2724-91-U: National Automobile, Aerospace And Agricultural Implement Workers Union Of Canada (CAW-Canada) (Complainant) v. Automodular Assemblies Inc. (Respondent) (*Withdrawn*)

2749-91-U: Robert E. Kemp (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 222 (Respondent) (*Dismissed*)

2775-91-U: Lynda Sacco (Complainant) v. Ontario English Catholic Teachers' Association and Ontario Catholic Occasional Teachers' Association (Respondents) (*Withdrawn*)

2894-91-U: Canadian Union Of Public Employees (Complainant) v. The Windsor Coalition for Development Health Care Association (Regency Park Lodge) (Respondent) (*Withdrawn*)

2913-91-U: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Bellrock Construction General Contractor Limited (Respondent) (*Dismissed*)

2978-91-U: Yves Gingras (Complainant) v. Association des Enseignant(e)s Franco-Ontariens (Respondent) (*Dismissed*)

2984-91-U: Rick Thiele (Complainant) v. General Motors Of Canada, CAW Local 222 (Respondents) (*Dismissed*)

2985-91-U: John Beaupre (Complainant) v. General Motors Of Canada, CAW Local 222 (Respondents) (*Dismissed*)

2986-91-U: Robert Harwood (Complainant) v. General Motors Of Canada Ltd., CAW Local 222 (Respondents) (*Dismissed*)

2987-91-U: Kamal Sangar (Complainant) v. General Motors Of Canada Ltd. &, CAW Local 222 (Respondents) (*Dismissed*)

3013-91-U: Thomas Gerard Mallany (Complainant) v. J.R. Mechanical Ltd. (Respondent) (*Dismissed*)

3053-91-U: Liquor Control Board Employee's - London Warehouse (Complainant) v. Ontario Liquor Board Employee's Union (Respondent) (*Dismissed*)

3060-91-U: Jack R. Colonnello (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

3061-91-U: Roy Fenwick (Complainant) v. Ontario Nurses Association (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2848-91-M: Christian Labour Association of Canada (Employer) v. Ledcor Industries Limited (Respondent) (*Dismissed*)

FINANCIAL STATEMENT

2541-91-M: Walter Kelly (Complainant) v. International Union of Operating Engineers, Local 796 (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

0290-91-JD: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Company Limited, and Schindler Elevator Company Limited and Foundation Company of Canada, and Plan Electric Company, and International Brotherhood of Electrical Workers, Local 353 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2408-91-M: Canadian Union of Public Employees (Applicant) v. Town of Ajax in the Parks & Recreation Department (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2662-90-OH: Ronald Gerald Tisler (Complainant) v. The Township of Matchedash Council (Respondent) (*Dismissed*)

1588-91-OH: Wayne Thurlby (Complainant) v. Reliance Electric Limited (Respondent) (*Withdrawn*)

2102-91-OH: Ray Siegel (Complainant) v. M.B.B. Mechanical Services Limited (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1859-90-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Cooper Electric Limited, M.T.C. Electric Limited (Respondents) (*Withdrawn*)

2034-90-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Black & MacDonald Limited (Respondent) (*Withdrawn*)

3268-90-G; 0100-91-G: International Association of Bridge, Structural and Ornamental Iron Workers Local 786 (Applicant) v. Steelfab Mechanical Maintenance Inc. (Respondent) (*Granted*)

3342-90-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Vollmer & Associates Contractors Limited, H. Pare Electric, Division Of Vollmer & Associates Contractors Limited, Bannon Sheet Metal, Division Of Vollmer & Associates Contractors Limited, Cardinal Air Conditioning Ltd. (Respondents) (*Withdrawn*)

3343-90-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. Vollmer & Associates Contractors Limited, H. Pare Electric, Division Of Vollmer & Associates Contractors Limited, Bannon Sheet Metal, Division Of Vollmer & Associates Contractors Limited, Cardinal Air Conditioning Ltd. (Respondents) (*Withdrawn*)

3344-90-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Vollmer & Associates Contractors Limited, H. Pare Electric, Division of Vollmer & Associates Contractors Limited, Bannon Sheet Metal, Division Of Vollmer & Associates Contractors Limited, Cardinal Air Conditioning Ltd. (Respondents) (*Withdrawn*)

0370-91-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 786 (Applicant) v. Canron Inc. (Respondent) (*Withdrawn*)

0375-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Elmway Construction Inc. (Respondent) (*Withdrawn*)

0534-91-G: International Union of Elevator Constructors Local 90 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)

0590-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Limited (Respondent) (*Granted*)

0980-91-G: L-K Interior Contracting Ltd., 754762 Ontario Inc. a.k.a. Tri-County Contracting and 666017 Ontario Limited (Applicant) v. L.K. Interior Contracting Ltd. and, 754762 Ontario Inc. a.k.a. Tri-County Contracting (Respondents) (*Granted*)

1184-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 18 (Applicant) v. 737049 Ontario Limited c.o.b. D'Luxe Drywall (1987), Stoney Creek Drywall Ltd., Saltfleet Drywall Inc. (Respondents) (*Withdrawn*)

1407-91-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. C & D Limited (Respondent) (*Granted*)

1545-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Mayfair Mechanical (Respondent) (*Withdrawn*)

1633-91-G: United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Jordan Construction Management Ltd. (Respondent) (*Withdrawn*)

1855-91-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Decon Developments Ltd. (Respondent) (*Granted*)

1980-91-G: Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Withdrawn*)

1992-91-G: Sheet Metal Workers' International Association Local Union 537 (Applicant) v. Bertozzi Roofing & Sheet Metal Inc. (Respondent) (*Granted*)

2065-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Limited (Respondent) (*Withdrawn*)

2116-91-G: Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. CTM Ceramics International Inc. (Respondent) (*Granted*)

2337-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Nelson Concrete Cutting (Respondent) (*Dismissed*)

2410-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. R.R. Projects Inc. (Respondent) (*Granted*)

2497-91-G: Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. CTM Ceramics International Inc. (Respondent) (*Granted*)

2555-91-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Formcrete Contracting Ltd. (Respondent) (*Granted*)

2574-91-G: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Bayritz Construction Ltd. (Respondent) (*Granted*)

2617-91-G: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Two Star Drywall Co. Ltd. (Respondent) (*Withdrawn*)

2641-91-G: International Brotherhood of Painters & Allied Trades, Local 200, Ottawa (Applicant) v. Meteor Painters/Contractors (Canada) Ltd. (Respondent) (*Withdrawn*)

2657-91-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. Hydraulique R & O Services Inc. (Respondent) (*Granted*)

2686-91-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Siding IPE Limited (Respondent) (*Granted*)

2689-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Vincent Spirito and Sons Ltd. (Respondent) (*Granted*)

2690-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Vincent Spirito and Sons Ltd. (Respondent) (*Granted*)

2701-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Centre Leasehold Improvements Limited (Respondent) (*Granted*)

2702-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Danielle Design (Respondent) (*Granted*)

2705-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Salvador Investments Inc.; Salvador Excavating Limited; Eclipse Excavating & Sales Ltd. (Respondents) (*Granted*)

2721-91-G; 2722-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pachino Construction Co. Ltd. (Respondent) (*Withdrawn*)

2735-91-G: Labourers' International Union of North America, Local 1059 (Applicant) v. C.W.A. Contracting (London) Ltd. (Respondent) (*Granted*)

2749-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. G.L. Drain Inc. (Respondent) (*Granted*)

2752-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Sanvilla General Construction Ltd. (Respondent) (*Granted*)

2764-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Melo Landscaping Ltd. (Respondent) (*Withdrawn*)

2771-91-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Kascon Corporation (Respondent) (*Withdrawn*)

2773-91-G: Ontario Provincial Conference of the International Union of Bricklayers' and Allied Craftsmen - Local 5 (Applicant) v. A. P. Green Refractories (Canada) Ltd. (Respondent) (*Withdrawn*)

2785-91-G: Sheet Metal Workers' International Association Local No. 30 (Applicant) v. Stephen M. Wallis Enterprises Limited (Respondent) (*Granted*)

2786-91-G: Sheet Metal Workers' International Association Local No. 30 (Applicant) v. Master Clad Inc. (Roofing, Decking & Siding) (Respondent) (*Granted*)

2787-91-G: Sheet Metal Workers' International Association Local No. 30 (Applicant) v. Master Clad Inc. (Respondent) (*Granted*)

2789-91-G: Sheet Metal Workers' International Association Local No. 30 (Applicant) v. Pen-Metal Fabricating Limited (Respondent) (*Granted*)

2790-91-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Marks Sheet Metal & Roofing Ltd. (Respondent) (*Granted*)

2793-91-G: International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Paul Skrypzak c.o.b. as Paul's Wallcovering and Decorating (Respondent) (*Granted*)

2812-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Art's Woodworking Ltd. (Respondent) (*Withdrawn*)

2825-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Millway Mechanical Inc. (Respondent) (*Granted*)

2827-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Boon's Crane Service (Respondent) (*Withdrawn*)

2830-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Tru-Wall Group Limited (Respondent) (*Withdrawn*)

2831-91-G: Labourers International Union of North America, Local 607 (Applicant) v. Gilcar Supervision and Management Limited (Respondent) (*Withdrawn*)

2832-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Antinori Inc. (Respondent) (*Withdrawn*)

2834-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Aries Electric (Respondent) (*Granted*)

2840-91-G: Labourers' International Union of North America, Local 607 (Applicant) v. Tom Jones Construction Inc. (Respondent) (*Withdrawn*)

2844-91-G: Labourers' International Union of North America, Local 247 (Applicant) v. Clarkson Construction Company Limited (Respondent) (*Withdrawn*)

2855-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Land Excavating & Grading Ltd. and, P.A. Land Excavating & Grading Ltd. (Respondents) (*Granted*)

2891-91-G: Labourers' International Union of North America, Local 837 (Applicant) v. Stradiotto Masonry (Respondent) (*Withdrawn*)

2903-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dayson Industrial Services (Respondent) (*Withdrawn*)

2904-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. West York Construction (1984) Ltd. (Respondent) (*Withdrawn*)

2907-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Dalacoustic Contractors Ltd. (Respondent) (*Granted*)

2920-91-G: International Union Of Operating Engineers, Local 793 (Applicant) v. Poce Construction Limited (Respondent) (*Withdrawn*)

2934-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Lasalle Backhoe Service division of Winkup Construction Limited (Respondent) (*Granted*)

2935-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. The Countryside Farms Limited (Respondent) (*Granted*)

2936-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Smith Bros. Excavating (Windsor) Ltd. (Respondent) (*Granted*)

2939-91-G: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Jacko & Burtnyk Ltd. (Respondent) (*Granted*)

2940-91-G: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Robco Electric Inc. (Respondent) (*Granted*)

2961-91-G: Labourers' International Union of North America, Local 1036 (Applicant) v. R M Elliott Construction Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2777-87-G: United Brotherhood of Carpenters and Joiners of America, Local 27 (Applicant) v. Ellis Don Limited (Respondent) (*Dismissed*)

2429-88-G: Local Union 353, International Brotherhood Of Electrical Workers (Applicant) v. E.S. Fox Limited (Respondent) (*Granted*)

0815-89-OH: Everette Chapelle (Complainant) v. Toronto Transit Commission Wheel Trans Department (Respondent) (*Dismissed*)

2448-90-U: International Association of Machinists and Aerospace Workers (Applicant) v. D.D.M. Plastics Incorporated (Respondent) (*Dismissed*)

2935-90-R: Labourers' International of North America Local 1081 (Applicant) v. Normbau 2000 Construction Inc. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 785 (Intervener) v. Mr. David Keast (Objectors) (*Dismissed*)

3450-90-OH; 0349-91-U: Kevin Flynn, Robert Peters, Tom Stark, Dan McLean (Applicants) v. Uniflo Sewer Services Inc., Bruce Allan Noble (Respondents) (*Granted*)

0590-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Limited (Respondent) (*Granted*)

1319-91-R; 1320-91-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Locals 463 and 599 (Applicants) v. Waylok Air Conditioning Limited (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

1464-91-U: Adberrahmane Elfarse (Complainant) v. United Electrical, Radio and Machine Workers of Canada, and its Local 520 (Respondent) v. Fisher & Ludlow (Intervener) (*Dismissed*)

2320-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ajax Paving Ltd. (Canada) Ltd. (Respondent) (*Granted*)

2453-91-U: Metropolitan Toronto Sewer and Watermain Contractors Association (Applicant) v. Arnott Construction Ltd., Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Union Labourers' International Union of North America, Local 183, Labourers International Union Of North America, Local 183 (Respondents) (*Granted*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

CA20N
LR
-O 54

Government
Publications

ONTARIO LABOUR RELATIONS BOARD REPORTS

February 1992



ONTARIO LABOUR RELATIONS BOARD

Chair M.G. MITCHNICK

Alternate Chair R.O. MACDOWELL

Vice-Chairs
M. BENDEL
J.B. BLOCH
L. DAVIE
N.V. DISSANAYAKE
O.V. GRAY
B. HERLICH
R.J. HERMAN
R.D. HOWE
J. JOHNSTON
B. KELLER
P. KNOPF
S. LIANG
J. McCORMACK
M.A. NAIRN
K. O'NEIL
K. PETRYSHEN
N.B. SATTERFIELD
I.M. STAMP
G. SURDYKOWSKI
S.A. TACON

Members

J. ANDERSON
B.L. ARMSTRONG
C.A. BALLENTINE
W.A. CORRELL
K.S. DAVIES
A.R. FOUCAULT
W.N. FRASER
P.V. GRASSO
A. HERSHKOVITZ
M. JONES
J. KENNEDY
H. KOBRYN
J. KURCHAK
J. LEAR
D.A. MacDONALD
W.J. McCARRON
C. McDONALD
R.R. MONTAGUE
J.W. MURRAY

W.S. O'NEILL
D.A. PATTERSON
H. PEACOCK
R.W. PIRRIE
F.B. REAUME
J. REDSHAW
K.V. ROGERS
J.A. RONSON
M.A. ROSS
J.A. RUNDLE
G.O. SHAMANSKI
R.M. SLOAN
E.G. THEOBALD
J. TRIM
M. VUKOBRAT
S. WESLAK
W.H. WIGHTMAN
N.A. WILSON
D.G. WOZNIAK

Registrar T.A. INNISS

Board Solicitors
K. HEWSON
R. LEBI
K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1992] OLRB REP. FEBRUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1.	Amorim Enterprises Ltd.; Re H.E.R.E., Local 75; Re Group of Employees	123
2.	Boise Cascade Canada Ltd.; Re I.A.M., Local 771 and I.B.E.W., Local 1744	127
3.	Canada Security Corporation; Re Canadian Security Union	129
4.	Cara Operations Limited; Re Canadian Union of Restaurant and Related Employees	130
5.	Cara Operations Limited; Re Hotel, Clubs, Restaurants, Taverns Employees Union, Local 261; Re Group of Employees	131
6.	E. S. Fox Ltd. and S.M.W., Local 269; Re Millwright District Council of Ontario, Local 1410; Re Ontario Sheet Metal and Air Handling Group	145
7.	Ellis-Don Limited; Re I.B.E.W., Local 894	147
8.	Grant Development Corporation and/or Pic Peron Bay Indian Band; Re L.I.U.N.A., Local 607	174
9.	Harrowood Seniors' Community; Re C.U.P.E., Local 3419	177
10.	Homewood Health Centre, The Homewood Sanitarium of Guelph Ontario Limited c.o.b. as; Re U.F.C.W., C.L.C., A.F.L., C.I.O.; Re Group of Employees	181
11.	J.M. Schneider Inc.; Re Schneider Office Employees' Association	186
12.	Ken Acton Plumbing & Heating Inc.; Re U.A., Local 527; Re Group of Employees	187
13.	Ledcor Industries Limited; Re L.I.U.N.A., Local 183; Re C.L.A.C.	190
14.	Mississauga Hospital, The; Re Practical Nurses Federation of Ontario; Re U.S.W.A.	191
15.	R.J.R. MacDonald Inc.; Re Bakery Confectionery & Tobacco Workers International Union AFL CIO CLC; Re Group of Employees.....	195
16.	Royal Homes Limited; Re C.J.A., Local 27; Re Group of Employees; Re C.J.A., Local 3054.....	199
17.	Steinberg Inc. (Miracle Food Mart Division) and The Great Atlantic and Pacific Company of Canada Limited; Re Teamsters' Union, Local 419; Re R.W.D.S.U., AFL, CIO, CLC and its Local 414.....	223
18.	Thermogenics Inc.; Re B.B.F.; Re Group of Employees.....	224
19.	Westview Electric Contractors, Rudy Chiefari c.o.b. as, T. Edison Electrical Enterprises Inc., and Westview Electric Contractors Inc.; Re I.B.E.W., Local 353	262

SUBJECT INDEX

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed	
ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894.....	147
Accreditation - Abandonment - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed	
ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894.....	147
Abandonment - Certification - Representation Vote - Union making displacement application - Incumbent union notifying Board that it wishes to abandon bargaining rights - Representation vote not required in circumstances - Certificate issuing	
CARA OPERATIONS LIMITED; RE CANADIAN UNION OF RESTAURANT AND RELATED EMPLOYEES	130
Bargaining Rights - Abandonment - Accreditation - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed	
ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894.....	147
Bargaining Unit - Certification - Evidence - Membership Evidence - Petition - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting photocopied membership evidence where originals lost through no fault of union - Bargaining rights restricted to employer's Airline Services Division - Certificate issuing	
CARA OPERATIONS LIMITED; RE HOTEL, CLUBS, RESTAURANTS, TAVERNS EMPLOYEES UNION, LOCAL 261; RE GROUP OF EMPLOYEES.....	131

II

Bargaining Unit - Build-Up - Certification - Whether seasonal employees should be excluded from bargaining unit - Employer engaged in buying, processing and storing of leaf tobacco, not tobacco harvesting - While not at season's height of activity, October certification application was made in season - Board determining that seasonal employees and permanent employees together represent a group of employees who can, on a viable basis, bargain collectively without creating serious labour relations problems for the employer - Issue of application of any build-up principle going to representation, not to bargaining unit configuration - Seasonal employees included in unit

R.J.R. MACDONALD INC.; RE BAKERY CONFECTIONERY & TOBACCO WORKERS INTERNATIONAL UNION AFL CIO CLC; RE GROUP OF EMPLOYEES.....

195

Bargaining Unit - Certification - Parties - Reconsideration - Employer submitting that panel placed undue emphasis on the need to facilitate access to collective bargaining and that it would have framed reply differently had it known that the Board proposed to undertake a review of its jurisprudence - Board noting that employer aware from the outset that the union had placed the bargaining unit issue before the Board - Access to collective bargaining one of several relevant factors considered by the Board - SEIU submitting that it was denied opportunity to participate in the proceeding in that it did not have notice from the Board - Board finding that SEIU had indicated no basis on which it could properly seek standing from the Board to intervene -Reconsideration application dismissed

MISSISSAUGA HOSPITAL, THE; RE PRACTICAL NURSES FEDERATION OF ONTARIO; RE U.S.W.A.

191

Bargaining Unit - Certification - Whether "ward clerks" should be included in service bargaining unit - Board rejecting employer submission that ward clerks' union membership evidence should be examined to determine the issue - Board ruling that where a union applies for certification for a unit that is appropriate, it is entitled to that unit even though there is a plausible alternative description which would also be appropriate - Bargaining unit sought by union including "ward clerks" found to be appropriate

HOMEWOOD HEALTH CENTRE, THE HOMEWOOD SANITARIUM OF GUELPH ONTARIO LIMITED C.O.B. AS; RE U.F.C.W., C.L.C., A.F.L., C.I.O.; RE GROUP OF EMPLOYEES.....

181

Build-Up - Bargaining Unit - Certification - Whether seasonal employees should be excluded from bargaining unit - Employer engaged in buying, processing and storing of leaf tobacco, not tobacco harvesting - While not at season's height of activity, October certification application was made in season - Board determining that seasonal employees and permanent employees together represent a group of employees who can, on a viable basis, bargain collectively without creating serious labour relations problems for the employer - Issue of application of any build-up principle going to representation, not to bargaining unit configuration - Seasonal employees included in unit

R.J.R. MACDONALD INC.; RE BAKERY CONFECTIONERY & TOBACCO WORKERS INTERNATIONAL UNION AFL CIO CLC; RE GROUP OF EMPLOYEES.....

195

Certification - Abandonment - Representation Vote - Union making displacement application - Incumbent union notifying Board that it wishes to abandon bargaining rights - Representation vote not required in circumstances - Certificate issuing

CARA OPERATIONS LIMITED; RE CANADIAN UNION OF RESTAURANT AND RELATED EMPLOYEES

130

Certification - Bargaining Unit - Build-Up - Whether seasonal employees should be excluded from bargaining unit - Employer engaged in buying, processing and storing of leaf tobacco,

not tobacco harvesting - While not at season's height of activity, October certification application was made in season - Board determining that seasonal employees and permanent employees together represent a group of employees who can, on a viable basis, bargain collectively without creating serious labour relations problems for the employer - Issue of application of any build-up principle going to representation, not to bargaining unit configuration - Seasonal employees included in unit

R.J.R. MACDONALD INC.; RE BAKERY CONFECTIONERY & TOBACCO WORKERS INTERNATIONAL UNION AFL CIO CLC; RE GROUP OF EMPLOYEES.....

195

Certification - Bargaining Unit - Evidence - Membership Evidence - Petition - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting photocopied membership evidence where originals lost through no fault of union - Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

CARA OPERATIONS LIMITED; RE HOTEL, CLUBS, RESTAURANTS, TAVERNS EMPLOYEES UNION, LOCAL 261; RE GROUP OF EMPLOYEES.....

131

Certification - Bargaining Unit - Parties - Reconsideration - Employer submitting that panel placed undue emphasis on the need to facilitate access to collective bargaining and that it would have framed reply differently had it known that the Board proposed to undertake a review of its jurisprudence - Board noting that employer aware from the outset that the union had placed the bargaining unit issue before the Board - Access to collective bargaining one of several relevant factors considered by the Board - SEIU submitting that it was denied opportunity to participate in the proceeding in that it did not have notice from the Board - Board finding that SEIU had indicated no basis on which it could properly seek standing from the Board to intervene - Reconsideration application dismissed

MISSISSAUGA HOSPITAL, THE; RE PRACTICAL NURSES FEDERATION OF ONTARIO; RE U.S.W.A.

191

Certification - Bargaining Unit - Whether "ward clerks" should be included in service bargaining unit - Board rejecting employer submission that ward clerks' union membership evidence should be examined to determine the issue - Board ruling that where a union applies for certification for a unit that is appropriate, it is entitled to that unit even though there is a plausible alternative description which would also be appropriate - Bargaining unit sought by union including "ward clerks" found to be appropriate

HOMEWOOD HEALTH CENTRE, THE HOMEWOOD SANITARIUM OF GUELPH ONTARIO LIMITED C.O.B. AS; RE U.F.C.W., C.L.C., A.F.L., C.I.O.; RE GROUP OF EMPLOYEES.....

181

Certification - Certification Where Act Contravened - Discharge - Practice and Procedure - Unfair Labour Practice - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspension, certain demotions and lay-offs motivated by anti-union animus - Employer harassment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the Act

ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES; RE C.J.A., LOCAL 3054.....

199

Certification - Certification Where Act Contravened - Unfair Labour Practice - Certification hearing held in June, union's unfair labour practice complaint made in July, and request for relief under section 8 of the Act made in August - Allegations supporting request under sec-

IV

tion 8 alleged to have occurred prior to June - Board deciding that union's delay disenti- tling it from relying on section 8 of the Act in support of certification application	
AMORIM ENTERPRISES LTD.; RE H.E.R.E., LOCAL 75; RE GROUP OF EMPLOYEES	123
Certification - Charges - Construction Industry - Reconsideration - Employee making "non-pay" allegation and seeking revocation of certificate - Facts pleaded not disclosing "non-pay" - Board reviewing and applying <i>Calvano Lumber</i> case in respect of "loan" issue and effect on Form 80 declaration - Reconsideration application dismissed	
KEN ACTON PLUMBING & HEATING INC.; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES	187
Certification - Construction Industry - Employer - Evidence - Practice and Procedure - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date	
GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN BAND; RE L.I.U.N.A., LOCAL 607	174
Certification - Petition - Unfair Labour Practice - Complaint in respect of certain lay-offs, letters from the company to the employees and incident regarding employee wearing union pin allowed - Complaint in all other respects dismissed - Petition held not a reliable indication of voluntary change of heart - Certificate issuing	
THERMOGENICS INC.; RE B.B.F.; RE GROUP OF EMPLOYEES	224
Certification - Practice and Procedure - Trade Union Status - Employer not challenging trade union status and having no objection to Board relying on documents filed by applicant in respect of status issue - Board satisfied that applicant a trade union within meaning of the Act - Certificate issuing	
CANADA SECURITY CORPORATION; RE CANADIAN SECURITY UNION	129
Certification - Pre-Hearing Vote - Timeliness - Respondent and intervener submitting that no pre-hearing vote ought to be directed because application untimely - Respondent and inter- vener signing new collective agreement following recent decision of the Board granting joint request for early termination of collective agreement - Applicant seeking reconsidera- tion of Board's decision granting early termination - Board directing that pre-hearing repre- sentation vote be taken and that ballots be sealed until parties have been given full opportu- nity to present their evidence and make their submissions	
LEDCOR INDUSTRIES LIMITED; RE L.I.U.N.A., LOCAL 183; RE C.L.A.C.	190
Certification Where Act Contravened - Certification - Discharge - Practice and Procedure - Unfair Labour Practice - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspen- sion, certain demotions and lay-offs motivated by anti-union animus - Employer harass- ment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the Act	
ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES; RE C.J.A., LOCAL 3054.....	199
Certification Where Act Contravened - Certification - Unfair Labour Practice - Certification hearing held in June, union's unfair labour practice complaint made in July, and request for	

relief under section 8 of the Act made in August - Allegations supporting request under section 8 alleged to have occurred prior to June - Board deciding that union's delay disintitling it from relying on section 8 of the Act in support of certification application

AMORIM ENTERPRISES LTD.; RE H.E.R.E., LOCAL 75; RE GROUP OF EMPLOYEES 123

Change in Working Conditions - *Hospital Labour Disputes Arbitration Act* - Unfair Labour Practice - Board determining that employer's failure to pay "interval" wage increases during 1990 and 1991 violating the statutory "freeze" - Union's delay in making complaint, in the circumstances, not standing in the way of a Board finding and remedial order - Complaint upheld - Employer directed to implement the wage increase for 1990 and 1991 according to its established practice

HARROWOOD SENIORS' COMMUNITY; RE C.U.P.E., LOCAL 3419..... 177

Charges - Certification - Construction Industry - Reconsideration - Employee making "non-pay" allegation and seeking revocation of certificate - Facts pleaded not disclosing "non-pay" - Board reviewing and applying *Calvano Lumber* case in respect of "loan" issue and effect on Form 80 declaration - Reconsideration application dismissed

KEN ACTON PLUMBING & HEATING INC.; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES 187

Collective Agreement - Abandonment - Accreditation - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed

ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894..... 147

Collective Agreement - Construction Industry - Employer Support - Related Employer - Remedies - Voluntary Recognition - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement

WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353..... 262

Construction Industry - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry Grievance - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying

abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed	
ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894.....	147
Construction Industry - Collective Agreement - Employer Support - Related Employer - Remedies - Voluntary Recognition - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement	
WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353.....	262
Construction Industry - Certification - Charges - Reconsideration - Employee making "non-pay" allegation and seeking revocation of certificate - Facts pleaded not disclosing "non-pay" - Board reviewing and applying <i>Calvano Lumber</i> case in respect of "loan" issue and effect on Form 80 declaration - Reconsideration application dismissed	
KEN ACTON PLUMBING & HEATING INC.; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES.....	187
Construction Industry - Certification - Employer - Evidence - Practice and Procedure - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date	
GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN BAND; RE L.I.U.N.A., LOCAL 607	174
Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board noting general tendency by parties to submit "boiler plate" briefs lacking in particularity in complaints with respect to assignment of work - Board observing that this approach not only retards and undermines pre-hearing process, but also tends to unnecessarily prolong and complicate the hearing of such a complaint	
E. S. FOX LTD. AND S.M.W., LOCAL 269; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO, LOCAL 1410; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP.....	145
Construction Industry Grievance - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed	
ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894.....	147

Discharge - Certification - Certification Where Act Contravened - Practice and Procedure - Unfair Labour Practice - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspension, certain demotions and lay-offs motivated by anti-union animus - Employer harassment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the Act ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES; RE C.J.A., LOCAL 3054.....	199
Employee Reference - Practice and Procedure - Employer submitting that inquiry authorized by the Board ought not to proceed until the union provides additional information specified in earlier Board decision - Board noting applicability of Practice Note #4 to this situation and ruling that the Officer will determine whether or not the union has complied sufficiently with the Board's direction to permit inquiry to proceed J.M. SCHNEIDER INC.; RE SCHNEIDER OFFICE EMPLOYEES' ASSOCIATION ...	186
Employer - Certification - Construction Industry - Evidence - Practice and Procedure - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN BAND; RE L.I.U.N.A., LOCAL 607	174
Employer support - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894.....	147
Employer Support - Collective Agreement - Construction Industry - Related Employer - Remedies - Voluntary Recognition - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353.....	262
Evidence - Bargaining Unit - Certification - Membership Evidence - Petition - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting	

VIII

photocopied membership evidence where originals lost through no fault of union -Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

CARA OPERATIONS LIMITED; RE HOTEL, CLUBS, RESTAURANTS, TAVERNS
EMPLOYEES UNION, LOCAL 261; RE GROUP OF EMPLOYEES..... 131

Evidence - Certification - Construction Industry - Employer - Practice and Procedure - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date

GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN
BAND; RE L.I.U.N.A., LOCAL 607 174

Evidence - Practice and Procedure - Sale of a Business - Witness - Board not persuaded that statutory duty under sub-section 64(13) satisfied through production by only one of the respondents of a witness to testify with respect to the allegation that a sale occurred - Second respondent directed to adduce, through *viva voce* testimony at the hearing, "all facts within their knowledge that are material to the allegation"

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT
ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS'
UNION, LOCAL 419; RE R.W.D.S.U., AFL CIO CLC AND ITS LOCAL 414..... 223

Hospital Labour Disputes Arbitration Act - Change in Working Conditions - Unfair Labour Practice - Board determining that employer's failure to pay "interval" wage increases during 1990 and 1991 violating the statutory "freeze" - Union's delay in making complaint, in the circumstances, not standing in the way of a Board finding and remedial order - Complaint upheld - Employer directed to implement the wage increase for 1990 and 1991 according to its established practice

HARROWOOD SENIORS' COMMUNITY; RE C.U.P.E., LOCAL 3419..... 177

Jurisdictional Dispute - Construction Industry - Practice and Procedure - Board noting general tendency by parties to submit "boiler plate" briefs lacking in particularity in complaints with respect to assignment of work - Board observing that this approach not only retards and undermines pre-hearing process, but also tends to unnecessarily prolong and complicate the hearing of such a complaint

E. S. FOX LTD. AND S.M.W., LOCAL 269; RE MILLWRIGHT DISTRICT COUNCIL
OF ONTARIO, LOCAL 1410; RE ONTARIO SHEET METAL AND AIR HANDLING
GROUP 145

Jurisdictional Dispute - Practice and Procedure - Board ruling that it would be inappropriate to apply the principles of *res judicata* in the circumstances of this case - Board noting that section 93(1) gives the Board authority to deal only with the assignment of work for which a demand has been made - Board not permitting complainant to amend its complaint to seek further alternative remedy

BOISE CASCADE CANADA LTD.; RE I.A.M., LOCAL 771 AND I.B.E.W., LOCAL
1744..... 127

Membership Evidence - Bargaining Unit - Certification - Evidence - Petition - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting

photocopied membership evidence where originals lost through no fault of union -Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

CARA OPERATIONS LIMITED; RE HOTEL, CLUBS, RESTAURANTS, TAVERNS
EMPLOYEES UNION, LOCAL 261; RE GROUP OF EMPLOYEES 131

Parties - Bargaining Unit - Certification - Reconsideration - Employer submitting that panel placed undue emphasis on the need to facilitate access to collective bargaining and that it would have framed reply differently had it known that the Board proposed to undertake a review of its jurisprudence - Board noting that employer aware from the outset that the union had placed the bargaining unit issue before the Board - Access to collective bargaining one of several relevant factors considered by the Board - SEIU submitting that it was denied opportunity to participate in the proceeding in that it did not have notice from the Board - Board finding that SEIU had indicated no basis on which it could properly seek standing from the Board to intervene -Reconsideration application dismissed

MISSISSAUGA HOSPITAL, THE; RE PRACTICAL NURSES FEDERATION OF
ONTARIO; RE U.S.W.A. 192

Petition - Bargaining Unit - Certification - Evidence - Membership Evidence - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting photocopied membership evidence where originals lost through no fault of union -Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

CARA OPERATIONS LIMITED; RE HOTEL, CLUBS, RESTAURANTS, TAVERNS
EMPLOYEES UNION, LOCAL 261; RE GROUP OF EMPLOYEES 131

Petition - Certification - Unfair Labour Practice - Complaint in respect of certain lay-offs, letters from the company to the employees and incident regarding employee wearing union pin allowed - Complaint in all other respects dismissed - Petition held not a reliable indication of voluntary change of heart - Certificate issuing

THERMOGENICS INC.; RE B.B.F.; RE GROUP OF EMPLOYEES 224

Practice and Procedure - Certification - Certification Where Act Contravened - Discharge - Unfair Labour Practice - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspension, certain demotions and lay-offs motivated by anti-union animus - Employer harassment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the Act

ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES;
RE C.J.A., LOCAL 3054..... 199

Practice and Procedure - Certification - Construction Industry - Employer - Evidence - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date

GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN
BAND; RE L.I.U.N.A., LOCAL 607 174

Practice and Procedure - Certification - Trade Union Status - Employer not challenging trade union status and having no objection to Board relying on documents filed by applicant in

respect of status issue - Board satisfied that applicant a trade union within meaning of the Act - Certificate issuing	
CANADA SECURITY CORPORATION; RE CANADIAN SECURITY UNION	129
Practice and Procedure - Construction Industry - Jurisdictional Dispute - Board noting general tendency by parties to submit "boiler plate" briefs lacking in particularity in complaints with respect to assignment of work - Board observing that this approach not only retards and undermines pre-hearing process, but also tends to unnecessarily prolong and complicate the hearing of such a complaint	
E. S. FOX LTD. AND S.M.W., LOCAL 269; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO, LOCAL 1410; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP	145
Practice and Procedure - Employee Reference - Employer submitting that inquiry authorized by the Board ought not to proceed until the union provides additional information specified in earlier Board decision - Board noting applicability of Practice Note #4 to this situation and ruling that the Officer will determine whether or not the union has complied sufficiently with the Board's direction to permit inquiry to proceed	
J.M. SCHNEIDER INC.; RE SCHNEIDER OFFICE EMPLOYEES' ASSOCIATION ...	186
Practice and Procedure - Evidence - Sale of a Business - Witness - Board not persuaded that statutory duty under sub-section 64(13) satisfied through production by only one of the respondents of a witness to testify with respect to the allegation that a sale occurred - Second respondent directed to adduce, through <i>viva voce</i> testimony at the hearing, "all facts within their knowledge that are material to the allegation"	
STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS' UNION, LOCAL 419; RE R.W.D.S.U., AFL CIO CLC AND ITS LOCAL 414.....	223
Practice and Procedure - Jurisdictional Dispute - Board ruling that it would be inappropriate to apply the principles of <i>res judicata</i> in the circumstances of this case - Board noting that section 93(1) gives the Board authority to deal only with the assignment of work for which a demand has been made - Board not permitting complainant to amend its complaint to seek further alternative remedy	
BOISE CASCADE CANADA LTD.; RE I.A.M., LOCAL 771 AND I.B.E.W., LOCAL 1744.....	127
Pre-Hearing Vote - Certification - Timeliness - Respondent and intervener submitting that no pre-hearing vote ought to be directed because application untimely - Respondent and intervener signing new collective agreement following recent decision of the Board granting joint request for early termination of collective agreement - Applicant seeking reconsideration of Board's decision granting early termination - Board directing that pre-hearing representation vote be taken and that ballots be sealed until parties have been given full opportunity to present their evidence and make their submissions	
LEDCOR INDUSTRIES LIMITED; RE L.I.U.N.A., LOCAL 183; RE C.L.A.C.	190
Reconsideration - Bargaining Unit - Certification - Parties - Employer submitting that panel placed undue emphasis on the need to facilitate access to collective bargaining and that it would have framed reply differently had it known that the Board proposed to undertake a review of its jurisprudence - Board noting that employer aware from the outset that the union had placed the bargaining unit issue before the Board - Access to collective bargaining one of several relevant factors considered by the Board - SEIU submitting that it was denied opportunity to participate in the proceeding in that it did not have notice from the	

Board - Board finding that SEIU had indicated no basis on which it could properly seek standing from the Board to intervene - Reconsideration application dismissed	
MISSISSAUGA HOSPITAL, THE; RE PRACTICAL NURSES FEDERATION OF ONTARIO; RE U.S.W.A.	191
Reconsideration - Certification - Charges - Construction Industry - Employee making “non-pay” allegation and seeking revocation of certificate - Facts pleaded not disclosing “non-pay” - Board reviewing and applying <i>Calvano Lumber</i> case in respect of “loan” issue and effect on Form 80 declaration - Reconsideration application dismissed	
KEN ACTON PLUMBING & HEATING INC.; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES	187
Related Employer - Collective Agreement - Construction Industry - Employer Support - Remedies - Voluntary Recognition - Board rejecting respondent’s submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union’s low-rise residential agreement	
WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353	262
Remedies - Collective Agreement - Construction Industry - Employer Support - Related Employer - Voluntary Recognition - Board rejecting respondent’s submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union’s low-rise residential agreement	
WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353	262
Representation Vote - Abandonment - Certification - Union making displacement application - Incumbent union notifying Board that it wishes to abandon bargaining rights - Representation vote not required in circumstances - Certificate issuing	
CARA OPERATIONS LIMITED; RE CANADIAN UNION OF RESTAURANT AND RELATED EMPLOYEES	130
Sale of a Business - Evidence - Practice and Procedure - Witness - Board not persuaded that statutory duty under sub-section 64(13) satisfied through production by only one of the respondents of a witness to testify with respect to the allegation that a sale occurred - Second respondent directed to adduce, through <i>viva voce</i> testimony at the hearing, “all facts within their knowledge that are material to the allegation”	
STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS’ UNION, LOCAL 419; RE R.W.D.S.U., AFL CIO CLC AND ITS LOCAL 414.....	223
Timeliness - Certification - Pre-Hearing Vote - Respondent and intervener submitting that no	

XII

pre-hearing vote ought to be directed because application untimely - Respondent and intervener signing new collective agreement following recent decision of the Board granting joint request for early termination of collective agreement - Applicant seeking reconsideration of Board's decision granting early termination - Board directing that pre-hearing representation vote be taken and that ballots be sealed until parties have been given full opportunity to present their evidence and make their submissions	
LEDCOR INDUSTRIES LIMITED; RE L.I.U.N.A., LOCAL 183; RE C.L.A.C.	190
Trade Union Status - Certification - Practice and Procedure - Employer not challenging trade union status and having no objection to Board relying on documents filed by applicant in respect of status issue - Board satisfied that applicant a trade union within meaning of the Act - Certificate issuing	
CANADA SECURITY CORPORATION; RE CANADIAN SECURITY UNION	129
Unfair Labour Practice - Certification - Certification Where Act Contravened - Discharge - Practice and Procedure - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspension, certain demotions and lay-offs motivated by anti-union animus - Employer harassment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the Act	
ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES; RE C.J.A., LOCAL 3054.....	199
Unfair Labour Practice - Certification - Certification Where Act Contravened - Certification hearing held in June, union's unfair labour practice complaint made in July, and request for relief under section 8 of the Act made in August - Allegations supporting request under section 8 alleged to have occurred prior to June - Board deciding that union's delay disentiing it from relying on section 8 of the Act in support of certification application	
AMORIM ENTERPRISES LTD.; RE H.E.R.E., LOCAL 75; RE GROUP OF EMPLOYEES	123
Unfair Labour Practice - Certification - Construction Industry - Employer - Evidence - Practice and Procedure - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date	
GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN BAND; RE L.I.U.N.A., LOCAL 607	174
Unfair Labour Practice - Change in Working Conditions - <i>Hospital Labour Disputes Arbitration Act</i> - Board determining that employer's failure to pay "interval" wage increases during 1990 and 1991 violating the statutory "freeze" - Union's delay in making complaint, in the circumstances, not standing in the way of a Board finding and remedial order - Complaint upheld - Employer directed to implement the wage increase for 1990 and 1991 according to its established practice	
HARROWOOD SENIORS' COMMUNITY; RE C.U.P.E., LOCAL 3419.....	177
Unfair Labour Practice - Certification - Petition - Complaint in respect of certain lay-offs, letters from the company to the employees and incident regarding employee wearing union pin allowed - Complaint in all other respects dismissed - Petition held not a reliable indication of voluntary change of heart - Certificate issuing	
THERMOGENICS INC.; RE B.B.F.; RE GROUP OF EMPLOYEES	224

Voluntary Recognition - Collective Agreement - Construction Industry - Employer Support - Related Employer - Remedies - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement	
WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353.....	262
Witness - Evidence - Practice and Procedure - Sale of a Business - Board not persuaded that statutory duty under sub-section 64(13) satisfied through production by only one of the respondents of a witness to testify with respect to the allegation that a sale occurred - Second respondent directed to adduce, through <i>viva voce</i> testimony at the hearing, "all facts within their knowledge that are material to the allegation"	
STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS' UNION, LOCAL 419; RE R.W.D.S.U., AFL CIO CLC AND ITS LOCAL 414.....	223

0557-91-R Hotel Employees Restaurant Employees Union, Local 75, Applicant v. Amorim Enterprises Ltd., Respondent v. Group of Employees, Objectors

Certification - Certification Where Act Contravened - Unfair Labour Practice - Certification hearing held in June, union's unfair labour practice complaint made in July, and request for relief under section 8 of the Act made in August - Allegations supporting request under section 8 alleged to have occurred prior to June - Board deciding that union's delay disentitling it from relying on section 8 of the Act in support of certification application

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *G. O. Shamanski* and *K. Davies*.

APPEARANCES: *Kevin Whitaker* and *Marilyn Smith* for the applicant; *Mona V. Anis*, *Paul Bachand* and *Joe Amorim* for the respondent; No one appearing for the group of employees.

DECISION OF THE BOARD; February 6, 1992

1. This is an application for certification. By decision dated September 20, 1991 the Board (differently constituted) directed that a representation vote be conducted among the employees in the bargaining unit. That panel further directed that the ballot box be sealed and the votes not counted until further order of the Board. Finally, the panel directed that the matter be listed for hearing for the purpose of providing the applicant with the opportunity to show cause as to why it was entitled in the circumstances to make application for relief pursuant to section 8 of the *Labour Relations Act* (the "Act").

2. The vote was held and the ballot box remains sealed. At the time of the vote questions arose regarding the eligibility of three individuals to vote. Those individuals were allowed to vote and their ballots were segregated. This panel convened to deal with two issues, namely, the applicant's request to rely on section 8 and the voter eligibility issues.

3. The chronology of events leading up to the applicant's request to rely on section 8 can be outlined as follows. The applicant filed its application for certification in May 1991. A terminal date was set and in the normal course prior to a hearing, the parties met with a Labour Relations Officer in early June 1991 to attempt to settle and/or narrow the issues in dispute. Following that meeting the only issue identified as being in dispute in the application by the parties was the issue of the voluntariness of a petition filed by a group of employees objecting to the application for certification.

4. A hearing was scheduled for June 20, 1991. The notice of that hearing identified its purpose to be "to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to the application". At that time evidence was led and submissions were heard by a panel of the Board. Subsequently, on July 31, 1991 the applicant filed a section 91 complaint [then section 89] alleging various violations of the Act by the respondent. On August 30, 1991 in a letter to the Registrar of the Board, the applicant requested relief under section 8 of the Act for the first time, indicating that it was relying on the section 91 complaint filed previously in support of its request. The respondent was advised of the applicant's letter and on September 5, 1991 took the position that the applicant was not, at that stage, entitled to raise or rely on section 8. These positions were put before the panel that had convened on June 20, 1991 and on September 20, 1991 a decision issued. That decision (by a majority of the panel) concluded that the petition filed represented a voluntary expression of employee wishes and ordered a representation vote. In light of the positions taken subsequently however the panel directed that the ballot box be sealed and a hearing was directed in order for the applicant to show cause 'why it was entitled to

make application under section 8 of the Act'. The vote was held on October 28, 1991 and the ballot box sealed.

5. In support of its position that it can, as of August 30, 1991, seek to rely on section 8, the applicant argues that there is no time limit for the filing of such a request under the Act and that the particulars filed (in the section 91 complaint) clearly establish a *prima face* case for the remedy requested. The applicant points to allegations in the complaint concerning the alleged discharge of a union organizer, alleged threats of closure, and alleged reductions in hours of work of employees which, the applicant alleges, were all improperly motivated and are therefore in violation of the Act. The applicant further argued that the issue of whether or not a petition represents a voluntary expression of employee wishes and the issue of whether such unfair labour practices have been committed by an employer so as to cause the Board to conclude that the true wishes of the employees are not likely to be ascertained are distinct issues, and there is no reason to preclude the applicant from now seeking to rely on the events particularized in its complaint in support of its request for section 8 relief. The respondent argued essentially, that most of the events relied on in the complaint took place prior to the hearing of June 20, 1991 and could have and should have been raised at that time if section 8 relief was being sought.

6. In reviewing the allegations contained in the section 91 complaint, we note that they do set out a *prima face* case and that the allegations, if taken as true, would constitute violations of the Act. As such they would raise the question of the appropriate remedial discretion to be exercised by the Board. However, section 8 provides a very specific and extraordinary remedial authority. While it is a precondition for the exercise of that authority that the employer has contravened the Act, the remedy is not one specifically directed at those contraventions. Section 8 allows the Board to certify an applicant trade union where the Board concludes that due to the employer's conduct in contravening the Act the true wishes of the employees are not likely to be ascertained. If the Board so concludes, the trade union can still be certified provided it can show it has membership support adequate for collective bargaining. A request for relief under section 8 does not arise in the absence of an application for certification. In other words, section 8 provides a remedy in a certification application not a section 91 complaint.

7. Although there is no time limit specifically set out in the Act for making a request for relief under section 8, issues in dispute in *any* proceeding need be joined prior to the hearing of the matter. The matter herein is an application for certification. That matter was set down for hearing on June 20th, and on the understanding that there was only one issue between the parties, that is, the voluntariness of the petition. Whether or not there is a specific overlap between the issues of the voluntariness of the petition and the matters alleged in the section 91 complaint (and we are of the view that the overlap is considerable), to the extent that the *conduct* in the complaint is relied on in support of a request under section 8, both go to the heart of the matter before the Board, that is, 'is the applicant entitled to be certified?'. Having reviewed the allegations contained in the section 91 complaint filed, we are satisfied that with the exception of those events alleged in paragraphs 21 and 27, the other events are all alleged to have occurred prior to June 20, 1991. We note particularly that the events upon which the applicant specifically relies (the alleged discharge, threats of closure and certain reductions in hours of work) are alleged to have occurred in May, 1991.

8. The applicant argued that there may be good labour relations reasons for a trade union not to make allegations against an employer as soon as it is aware of them. This may be so in certain circumstances and we note that the applicant's section 91 complaint remains outstanding. If the allegations contained therein are proven, the applicant is entitled to seek remedies from the Board with respect to those contraventions of the Act. However that is a separate matter from

claiming relief in its certification application which was heard on June 20th. In any event, the applicant offered no explanation in this case for its delay in raising its request for section 8 relief.

9. The delay clearly is one in relation to the hearing of the certification application. To raise section 8 now would effectively allow the trade union to raise issues surrounding the appropriate disposition of the certification application after a hearing convened specifically to deal with those issues has been held. Similarly for example, the Board will not generally entertain allegations of trade union misconduct made by employees for the first time after a certification application has been heard. It is simply too late. All the parties have had the opportunity to fully identify the issues and present their case.

10. On the other hand, where *after* a hearing has been held, but prior to a vote being taken, an employer allegedly engages in unfair labour practices of such an extent that the Board might conclude that the true wishes of the employees were not likely to be ascertained in a vote, a request for section 8 relief may well be appropriate. That is not however the case here.

11. We conclude therefore that the applicant is not now entitled to rely on section 8 in support of its application for certification.

12. The remaining issue was the eligibility to vote of three individuals. At the outset of the hearing the parties advised the panel that they were agreed that Tracy Barrette was not eligible to vote in that she had resigned effective prior to the taking of the vote. Having regard to that agreement we direct that any ballot cast by Tracy Barrette be destroyed and not counted.

13. The parties remained in dispute with respect to whether or not Jamie Malaquias and Mike Malaquias were eligible to vote. The position of the applicant is that they are not employees and not entitled to cast a ballot. The respondent disputes this.

14. The decision ordering the vote stipulated that all those employed on September 20, 1991 who were so employed on the date the vote was taken would be eligible to vote. The bargaining unit is described as all employees of the respondent at its Harvey's Restaurant located at 3095 Dougall Road in the City of Windsor, save and except assistant managers and those above the rank of assistant manager.

15. The two individuals in dispute are employed on a casual, as-needed basis to cook and perform general cleaning tasks. They are students who are also employed at another separate Harvey's Restaurant in Chatham, Ontario, where they live.

16. In response to the application for certification the respondent as required, filed a list of employees in the bargaining unit. The names of these two individuals were included on Schedule C indicating that one had been laid-off in January 1991 and the other laid-off in April 1991. Schedule C further indicated that both were expected to be recalled on June 27, 1991. In fact, both individuals worked one shift on May 24, 1991, the Victoria Day holiday, and again on July 1, 1991, the Canada Day holiday. The uncontradicted evidence is that these two individuals have, from approximately mid - 1988 to early 1991 worked on an as - needed, casual basis for the respondent covering statutory holidays and periodic difficulties in scheduling. During early 1991 as a result of a general down-turn in business and street construction affecting access to the restaurant neither individual was required.

17. Following the July 1st holiday, Jamie Malaquias worked five shifts between September 7 and October 19, 1991. Similarly, Mike Malaquias worked seven shifts between August 17 and October 19, 1991. Since October 19, 1991 neither has worked in the Windsor restaurant. The

applicant asserted that these individuals should not be entitled to vote because their hours of work were “padded” between the time of the hearing of the voluntariness of the petition and the date of the vote. The applicant asserts that due to a special personal relationship between the individuals and the respondent’s Manager, they have been scheduled so as to affirm their employment status in order to help defeat the applicant’s certification application. The respondent denies this relying on the bargaining unit description encompassing all employees and arguing that there is no evidence to suggest that these individuals were not employees in the bargaining unit at the relevant times. The respondent’s Manager reviewed in evidence the scheduling difficulties he encountered and why additional staff were required for these shifts.

18. The applicant does not challenge that the respondent may have needed casual staff to cover gaps in scheduling or coverage. It challenges the respondent’s choice of individual. Even assuming that the respondent called these particular individuals rather than others (there is no evidence that other individuals were available), on the evidence we cannot conclude that these individuals were not employees in the bargaining unit at the relevant times. There is no dispute that they were employees as of the date of the certification application. Their names appeared on Schedule C. They were excluded from the list of employees for purposes of the count based on the Board’s “30/30 rule” but that is a distinct issue from their employment status and their subsequent eligibility to vote. While Schedule C appears to be incorrect when compared with the time cards filed in evidence in that both individuals worked a shift on May 24, 1991 that does not affect the result.

19. There is no limit in the bargaining unit description so as to exclude casual or part-time employees. It is an “all-employee” bargaining unit. These individuals have been employed (albeit on a casual basis) since mid- 1988. There is no evidence or suggestion of their termination from employment. They were employed in the bargaining unit on September 20, 1991, the date of the Board’s decision, and continued to be employed on the date the vote was taken. Even if they had not worked those shifts that give rise to the applicant’s concern, they fall within the Board’s direction regarding eligibility to vote. The fact that they may not have worked after the vote is inconclusive and irrelevant. Individuals employed prior to a vote may, for example, resign their employment immediately following the taking of the vote yet would still have been eligible to vote.

20. We find therefore that Jamie Malaquias and Mike Malaquias were eligible to vote and any ballot cast by either of them is to form part of the vote count. Given our conclusion that the applicant is not now entitled to seek relief pursuant to section 8 of the Act we direct that the ballot box be opened and the ballots be counted forthwith.

21. This matter is referred to the Manager of Field Services for the purpose of the counting of the ballots.

1770-87-JD Boise Cascade Canada Ltd., Complainant v. International Association of Machinists and Aerospace Workers, Lodge 771 and International Brotherhood of Electrical Workers, Local Union 1744, Respondents

Jurisdictional Dispute - Practice and Procedure - Board ruling that it would be inappropriate to apply the principles of *res judicata* in the circumstances of this case - Board noting that section 93(1) gives the Board authority to deal only with the assignment of work for which a demand has been made - Board not permitting complainant to amend its complaint to seek further alternative remedy

BEFORE: Ken Petryshen, Vice-Chair, and Board Members J. Trim and H. Kobryn.

APPEARANCES: Peter J. Thorup for the complainant; L. A. Richmond for the Machinists and Aerospace Workers, Lodge 771; S.B.D. Wahl for the Electrical Workers, Local Union 1744.

DECISION OF THE BOARD; February 17, 1992

1. This is a complaint under section 93 [formerly section 91] of the *Labour Relations Act* in which the complainant has requested the Board to issue a direction with respect to the assignment of certain work.

2. During the last two days of hearing the Board entertained representations from the parties on certain motions made by the I.B.E.W. and reserved its decision on all but one of them. Our determinations of the motions are set out below.

3. Counsel for the I.B.E.W. argued that the panel was compromised by Boise's conduct during the hearing of December 12 and 13, 1990 when Boise allegedly entered into settlement efforts before the panel. After entertaining this motion, the Board ruled orally at the hearing that it was not compromised by the events which occurred on December 12 and 13, 1990. In our view, Boise was not involved in settlement efforts before the panel at the hearing on those days.

4. Counsel for the I.B.E.W. also argued that issues raised in this complaint were *res judicata* having regard to a previous Board decision in a jurisdictional dispute complaint involving the same parties. The Board is satisfied that the complainant should not be precluded from proceeding with this complaint since it would be inappropriate to apply the principles of *res judicata* in the circumstances of this case. In our view, it has not been established that the issues in this complaint, having to do with a particular assignment of work, are the same issues which arose and were decided in the previous complaint.

5. Counsel for the I.B.E.W. also argued that the Board should not permit the complainant to amend its complaint in order to seek a remedy which would have an impact on the type of instrumentation work performed by the I.B.E.W.. The circumstances giving rise to this motion can be briefly stated.

6. I.A.M. employees and I.B.E.W. employees perform instrumentation work at the complainant's pulp and paper mill at Fort Frances. The I.A.M. employees work on pneumatic instrumentation equipment while the I.B.E.W. employees work on electronic instrument equipment. In 1987, Boise assigned the instrumentation work previously performed by I.A.M. employees to I.B.E.W. employees. The I.A.M. employees also continued to perform the pneumatic instrumentation work. The I.A.M. grieved this situation and the Board has determined that I.A.M. made a demand to the complainant that the pneumatic instrumentation work be assigned to the I.A.M.

employees and not to the I.B.E.W. employees. It was these events which led the complainant to file this complaint. The complainant requested in essence that the Board either assign all instrumentation work to the I.B.E.W. or alternatively that the Board direct that both I.A.M. employees and I.B.E.W. employees could be assigned pneumatic instrumentation work. The parties to the complaint recognized that it did not impact upon the I.B.E.W. jurisdiction over electronic work. On this basis, the I.B.E.W. discharged its counsel and had representatives attend the hearing essentially as observers.

7. Near the completion of the examination-in-chief of its only witness, the complainant filed a document with the Board which in effect constituted a request to amend the complaint in order to place before the Board another remedial option. As another alternative, the complainant requested in essence that all instrumentation work be performed by both I.A.M. and I.B.E.W. employees. This was the first time in the proceedings that the jurisdiction of the I.B.E.W. over electronic instrumentation work became an issue. In his motion, counsel for the I.B.E.W. relied on a number of grounds in support of his position that the Board should not permit the complainant to amend its complaint to seek the further alternative remedy.

8. Having considered the parties' submissions on this motion, the Board is satisfied that the I.B.E.W.'s position has merit.

9. As noted earlier, what gave rise to this dispute was the assignment of pneumatic instrumentation work to I.B.E.W. employees and the demand of the I.A.M. that that particular work be assigned to its members. As a result of the demand for particular work by the I.A.M., the Board determined that it had jurisdiction under section 93 to entertain the complaint. Section 93(1) gives the Board a broad remedial authority "with respect to the assignment of work". We interpret section 93(1) as giving the Board the authority to only deal with the assignment of work for which a demand has been made. It appears that the assignment of electronic instrumentation work has been made only to the I.B.E.W. and that no one, including the I.A.M., has made a demand within the meaning of section 93 for electronic instrumentation work. Given the wording and intent of section 93, the Board does not have jurisdiction in these circumstances to make any directions with respect to the electronic instrumentation work.

10. Even if the Board determined that it did have jurisdiction under section 93 in these circumstances to make directions with respect to electronic instrumentation work, it would not be inclined to permit the amendment having regard to the timing of the request. Allowing the amendment would fundamentally alter the nature of the complaint and the Board would have to direct that the case be re-tried. This case is well beyond the point where such an approach is reasonable.

11. Accordingly, the Board will not permit the complainant to amend its complaint as requested. The hearing in this matter will continue on the dates previously scheduled.

3481-91-R Canadian Security Union, Applicant v. Canada Security Corporation, Respondent

Certification - Practice and Procedure - Trade Union Status - Employer not challenging trade union status and having no objection to Board relying on documents filed by applicant in respect of status issue - Board satisfied that applicant a trade union within meaning of the Act - Certificate issuing

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

DECISION OF THE BOARD; February 20, 1992

1. This is an application for certification in which the parties have reached agreement on all matters in dispute and have further agreed to waive their right to a formal hearing in the matter.

2. The applicant was advised by the Registrar that it has not been previously been found to be a trade union by the Board. During the course of the "waiver" process the applicant filed certain additional documents namely Minutes of the founding meeting of the applicant and a copy of the constitution adopted at that time. Copies of those documents were provided to the respondent who subsequently advised the Board that it was not challenging the applicant's status and had no objection to the Board relying on those documents in respect of the status issue. Having regard to the positions of the parties and the material filed, the Board is satisfied that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board further finds that:

all security guards employed by Canada Security Corporation in and out of the Municipality of Metropolitan Toronto, save and except Mobile Response Officers, persons above the rank of Mobile Response Officer, Investigators, and office and clerical staff,

constitute a unit of employees of the respondent appropriate for collective bargaining.

4. In accordance with the Rules of Practice respecting applications for certification, the respondent employer has filed a list of employees in the bargaining unit, together with specimen signatures for the employees on that list. Having regard to the list filed by the employer, and the finding of the Board with respect to the bargaining unit description, the Board is satisfied that there were 32 employees in the unit, at the time the application was made.

5. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards, which consist of combination applications for membership and receipts. The membership cards are signed by the employees, and the receipts are countersigned and indicate that a payment of one dollar has been made within the six-month period immediately preceding the terminal date for this application. The money was collected by more than one collector and the membership evidence is supported by a duly completed Form 9, Declaration Concerning Membership Documents.

6. The Board is satisfied, on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the respondent in each bargaining unit, at the time the application was made, were members of the applicant on February 11, 1992, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. A certificate will issue to the applicant.
-

3324-91-R The Canadian Union of Restaurant and Related Employees, Applicant v. Cara Operations Limited, Respondent

Abandonment - Certification - Representation Vote - Union making displacement application - Incumbent union notifying Board that it wishes to abandon bargaining rights - Representation vote not required in circumstances - Certificate issuing

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Ronson* and *E. G. Theobald*.

DECISION OF THE BOARD; February 12, 1992

1. The style of cause is hereby amended to reflect the correct name of the respondent: "Cara Operations Limited".
2. This is an application for certification in which the parties have reached agreement on all matters in dispute and have further agreed to waive their right to a formal hearing in the matter.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
4. As of the date of application for certification the Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88 ("Local 88") held bargaining rights for the bargaining unit of employees described in paragraph 5 herein. It received notice of this application. In the normal course the Board would, when one trade union is seeking by way of a certification application to displace another trade union's bargaining rights, in addition to ensuring the normal requirements for certification, also hold a representation vote of the employees in the bargaining unit. The results of that vote would determine which of those two trade unions would then hold the bargaining rights. In this case however, Local 88 has notified the Board by letter dated February 7, 1992 that it wishes to abandon its bargaining rights in respect of this bargaining unit. Having regard to that position, we hereby declare that Local 88 no longer represents the employees of Cara Operations Limited in this bargaining unit for which it was the bargaining agent.
5. Having regard to the application for certification and to the agreement of the parties, the Board further finds that:

all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Cara Operations Limited at its Swiss Chalet Take-Out and Restaurant at 245 Dixon Road in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager

constitute a unit of employees of the respondent appropriate for collective bargaining.

6. In accordance with the Rules of Procedure respecting applications for certification, the respondent employer has filed a list of employees in the bargaining unit, together with specimen signatures for the employees on that list. Having regard to the list filed by the employer, and the

finding of the Board with respect to the bargaining unit description, the Board is satisfied that there were 12 employees in the unit, at the time the application was made.

7. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards, which consist of combination applications for membership and receipts. The membership cards are signed by the employees, and the receipts are countersigned and indicate that a payment of one dollar has been made within the six-month period immediately preceding the terminal date for this application. The money was collected by one collector and the membership evidence is supported by a duly completed Form 9, Declaration Concerning Membership Documents.

8. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 31, 1992, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. A certificate will issue to the applicant.

2658-91-R Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261, Applicant v. **Cara Operations Limited**, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Evidence - Membership Evidence - Petition - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting photocopied membership evidence where originals lost through no fault of union - Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *D. A. MacDonald* and *K. Davies*.

APPEARANCES: *Sean McGee*, *John R. Kearney*, *Valerie Picard* and *Karen Grella* for the applicant; *David Corbett*, *George High* and *Hugh Smith* for the respondent; *Norm Manns* for the objectors.

DECISION OF THE BOARD; February 4, 1992

1. The name of the respondent is amended to read: "Cara Operations Limited".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
4. As part of the regional certification program, the applicant and the respondent met with a Labour Relations Officer on December 12, 1991 in Ottawa in order to attempt to resolve or at least narrow the issues in dispute. The Board Officer's Report discloses that the parties were

unable to agree on the description of the bargaining unit and whether or not the applicant could rely on photocopies of its membership evidence in support of this application. At the hearing on December 19, 1991, Mr. Norm Manns appeared representing a group of employees objecting to the certification of the applicant and asked the Board to consider his petition. The parties disagreed on whether the Board should give any weight to Mr. Manns' petition. After hearing from the parties on the issues they placed before the Board on December 19, 1991, the Board reserved its rulings. The Board's determinations of the issues, with reasons, are set out below, beginning with the petition issue.

The Petition

5. Mr. Manns did not appear at the Labour Relations Officer's meeting but, as noted above, he did appear at the hearing before the Board on December 19, 1991. Mr. Manns advised the Board that he circulated a petition opposing the certification of the applicant. On November 28, 1991, the terminal date fixed for this application, Mr. Manns delivered his petition to the Office of the Official Examiner in Ottawa and left it with the receptionist. She advised Mr. Manns that she would give it to a Labour Relations Officer. It appears that Mr. Jackson, the Labour Relations Officer who conducted the meeting on December 12, 1991, was handed the petition on December 12, 1991 by someone in the Office of the Official Examiner when he arrived for the meeting. The Board's file did not contain Mr. Manns' petition and the Board did not acknowledge having received it. Mr. Manns provided the panel with a copy of his petition at the hearing. Mr. Manns explained that he concluded he could deliver his petition to the Office of the Official Examiner after reading Form 6, the Notice to Employees.

6. At one point, Mr. Manns stated that he delivered the petition to the wrong place. In submissions, he requested an extension of the terminal date and stated that he wished the Notice to Employees was clearer on where petitions could be delivered. Counsel for the respondent argued that the petition was filed in a timely way and, alternatively, counsel submitted that the Board should extend the terminal date so its filing would be timely. Counsel argued that a reasonable employee would infer from Form 6 that a petition could be delivered to the Office of the Official Examiner. Counsel suggested that the receptionist's acceptance of the document and the indication that it would be passed on to a Labour Relations Officer should be sufficient. Counsel also argued that the confusion caused by Form 6 should cause the Board to extend the terminal date. Counsel for the applicant took the position that the petition was not filed in a timely fashion and that no basis existed for the extension of the terminal date.

7. In order to appreciate the submissions, the Board has attached as an Appendix to this decision, a copy of the Form 6 Notice to Employees (in English) that was posted in this case.

8. Posted with the Form 6 is another Notice to Employees which explains the certification process and the rights of employees. Under the question "What is the terminal date?" the Notice contains the following:

The terminal date is set by the Board. It is normally seven to ten days following the date the application for certification was received. *This is the date by which the trade union applying for certification must file its membership evidence and interested employees must file any documents expressing opposition to certification of the trade union or revoking that opposition.* Material sent by registered mail on or before the terminal date is considered to have been filed as of the date of mailing. Otherwise documents are filed when they are received by the Board.

If documents opposing the union or indicating an employee no longer wishes to oppose the union are not received by the Board by the terminal date or sent by registered mail to the Board by that date, the Board generally refuses to consider them.

Evidence of employee wishes is kept confidential by the Board.

9. The following provisions of the Act and Rules of Procedure are relevant to this issue:

The Act

105.-(18) The Office of the Board shall be in Toronto, but the Board may sit at other places that it considers expedient.

The Rules

1.-(1) In these Rules,

(a) “file” means file with the Board;

* * *

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

* * *

75.-(1) Where a document is required to be filed by these Rules, filing shall be deemed to be made,

(a) at the time it is received by the Board; or

(b) where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto, Ontario, M7A 1V4, at the time it is mailed.

* * *

82.-(2) The Board may, upon such terms as it considers advisable, enlarge the time prescribed by these Rules for doing any act, serving any notice, filing any report, document or paper or taking any proceeding and may do so although application therefor is not made until after the expiration of the time prescribed.

10. Rule 73(1) provides that evidence of membership or evidence of objection shall not be accepted by the Board unless the evidence is filed not later than the terminal date. Rule 1(1) indicates that “file” means file with the Board. Rule 75(1) addresses when a document is deemed to have been filed with the Board. It provides that a document shall be deemed to be filed at the time it is received by the Board or at the time it is mailed where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto.

11. On the evidence and submissions before us, the Board finds that Mr. Manns did not file his petition with the Board on or before the terminal date of November 28, 1991. Mr. Manns did

not send his petition to the Board by registered mail on or before November 28, 1991, nor did the Board receive his petition on or before November 28, 1991. Mr. Manns delivered his petition to the Office of the Official Examiner. The Board does not have an office in Ottawa but does hold hearings and Board Officer meetings in Ottawa at various locations, one of them being the Office of the Official Examiner. There is nothing in the Notices to Employees or at the building in Ottawa where the Office of the Official Examiner is located which advises employees that the Board has an office in Ottawa.

12. Is this an appropriate case in which to extend the terminal date? The situation here is not one where an employee takes the position that insufficient notice was given of the application. Rather, the argument is that the Form 6 Notice to Employees is unclear and that a reasonable employee, on reading the Notice, would conclude that what Mr. Manns did complied with the filing requirements. The Board is satisfied that its Notices to Employees are clear and that any reasonable employee who takes the time to read them carefully would understand how to file a document with the Board in a timely way. The Form 6 Notice to Employees, among other things, advises employees of the time and location of the hearing, as well as the time and location of the Board Officer's meeting. In this instance, both were to take place at the Office of the Official Examiner in Ottawa. Paragraph 4 of the Form 6 Notice to Employees provides that petitions must be filed with the Board and received by the terminal date if sent other than by registered mail. Paragraph 6 of Form 6 refers to the address of the Board's offices. Part I of the Form 6 Notice provides that all communication should be addressed to the Registrar and sets out the Board's Toronto address. In our view, the Notices to Employees convey to employees that a petition that is not sent by registered mail must be received by the Board by the terminal date. The Form 6 Notice indicates where *all* communication should be sent and where the Board's offices are located. A reasonable person reading the Form 6 Notice would appreciate that the Officer's meeting and the Board hearing were to be held at the Office of the Official Examiner and not at the Board's offices. The Board is satisfied that its Notices clearly indicate to employees where and how petitions can be filed with the Board in order to comply with the Rules.

13. The Board has often stated the importance of a final cut-off point for the filing of evidence of employee wishes. The Board made the following comments in *The Westin Hotel*, [1986] OLRB Rep. Oct. 1486:

13. ... It is our view that the terminal date, and Rules relating to it, are not technical matters. Furthermore, the need for clear rules and their consistent application requires the Board to make it clear to parties when their documents will be considered filed and when all evidence must reach the Board. The question of the appropriate terminal date is not equivalent to the failure to name the employer on a petition or the failure to designate the section under which a complaint has been made, situations in which amendments are permitted; rather, as pointed out above, it addresses a matter of significance in labour relations: the date at which all parties can be satisfied all evidence must be filed if it is to be considered by the Board.

In exercising its discretion, the Board is satisfied that it would be inappropriate in the circumstances of this case to extend the terminal date. Accordingly, the Board will not give any weight to Mr. Manns' petition in assessing the membership evidence filed by the applicant since the petition was not filed with the Board on or before the terminal date.

The Membership Evidence

14. The Board did not receive the original membership evidence from the applicant, but rather photocopies of that evidence. The applicant takes the position that in the circumstances the Board should rely on the photocopies. The respondent takes the opposite position.

15. Valerie Picard, a secretary employed by the applicant and the person who does its mailing, testified regarding the membership evidence sent to the Board in support of this application. She testified that she received the original membership cards and six sets of photocopies of the original membership evidence from Andre Plouffe, the applicant's organizer. She typed a list of employees, with their addresses, and also typed a Form 9 for Karen Grella's signature. Ms. Picard stated that she sent to the Board the original membership cards, 6 sets of photocopies of the original membership cards, 6 copies of the list of employees and 6 copies of the Form 9. Because of the quantity, Ms. Picard stated that she put the material in two large envelopes which she taped together. She testified that she clearly recalls putting the original membership cards in one of the envelopes. Ms. Picard testified that she went to the post office and sent the two envelopes to the Board by registered mail. Ms. Picard identified the photocopies received by the Board as the ones she sent by registered mail. She also identified the two envelopes taped together which the Board received as the ones she sent. Ms. Picard has been employed by the applicant as a secretary since September 1990 and during this time she has filed other applications and membership evidence with the Board. It is her practice and the applicant's to send the Board the original membership cards and six photocopies.

16. B. Jackson, the Labour Relations Officer, called Ms. Picard on December 9, 1991, and advised her that the Board received the photocopies but not the original membership cards. Mr. Jackson suggested that she look through the office. Even though she was sure she sent the original cards, she did as he suggested for fifteen to twenty minutes before leaving for the day. The next day Ms. Picard advised Frank Grella (the applicant's Secretary-Treasurer) of Mr. Jackson's call. Mr. Grella and Ms. Picard searched throughout the office but did not find the original cards. On that day, Ms. Picard was instructed to go to the post office and ask if there was any way of finding the cards. She did not receive an optimistic response at the post office. On the day prior to the hearing, Ms. Picard went to the post office and asked for the cards to be traced. She testified that she recognized the importance of sending the original membership cards and that she felt she might be blamed if the Board did not receive them.

17. Andre Plouffe testified that he made photocopies of the cards and gave the original cards and some photocopies to Ms. Picard. He stated that the photocopies which the Board received were copies of the original membership evidence.

18. Counsel agreed that the appropriate principles to apply when a trade union seeks to rely on photocopied membership evidence are set out in the relatively recent decision of the Board in *American Barrick Resources Corporation carrying on business as Holt-McDermott Mine*, [1990] OLRB Rep. March 267. The following paragraphs of that decision set out the facts, the Board's review of some cases and its conclusions:

19. The applicant filed photocopies of the evidence of membership on or before the terminal date of this application for certification with respect to those persons who made application to join the applicant. The original evidence of membership consisted of individual membership cards which were packaged and forwarded together with a binder. In the binder were photocopies of the evidence of membership. This material was forwarded from Kirkland Lake to the Legal Department of the applicant by priority post. The envelope which was used was a brown paper padded envelope such as might be used to send a book through the mails. The envelope was closed by means of staples and was received in Mr. Shell's office on November 7, 1989. Mr. Shell's secretary recalls that upon receipt the envelope was taped. The envelope had been opened by pull string and its contents were removed. The membership cards were not in the envelope. The envelope had been packed in Kirkland Lake with membership cards and photocopies of the membership evidence by Wes Dowsett personally. The photocopies of the membership evidence which were placed in the package by Mr. Dowsett who is a casual employee of the applicant and who works as an organizer. The envelope had been forwarded to the applicant so that the membership cards could be filed with the Board on or before the terminal date of

November 16. The applicant has searched and checked and concludes that the membership cards have been lost. Mr. Dowsett has reconstructed the package by placing the same number of other membership cards therein and has ascertained that the package weighed the same as when it was initially mailed. The stapled envelope had been opened accidentally or otherwise and was resealed by the Post Office. The applicant discovered that the membership cards were missing on November 10 and on November 12 learned with certainty that none of its personnel had the membership cards. The applicant filed photocopies of the membership cards on or before the terminal date and advised the Board that it did not rely upon the membership evidence with respect to one person. The applicant engaged in a strenuous Form 9 inquiry and as an appendix to Form 9, Declaration Concerning Membership Documents, disclosed as follows:

APPENDIX "A"

The membership evidence submitted in support of the application for certification consists of photocopies of individual applications for membership to the United Steelworkers of America. The applicant hereby confirms that each of the collectors of the memberships for application has confirmed the authenticity and validity of each document filed in support of membership in the Steelworkers and that has been filed in support of the application for certification.

In submitting this Form 9 Declaration and Appendix the applicant notes that because of exceptional circumstances (see cover letter) it must rely upon the photocopies of membership evidence. Accordingly, the applicant has undertaken an exceptionally rigorous review and confirmation of the validity of the membership evidence in support of the application for certification. The applicant is prepared to bring evidence as to why it is relying upon the photocopied membership evidence in this case.

With regard to the membership evidence filed on behalf of:

1. (Name), the applicant states that the correct date of signing for request of membership in the applicant, payment of the \$1.00 and collection of the \$1.00 is August 30, 1989.
2. (Name), the applicant states that the correct date of signing for request of membership in the applicant, payment of the \$1.00 and collection of the \$1.00 is September 1, 1989.

As a result of not being able to ascertain who collected one card, the applicant asked that it not be relied upon. The membership cards have been lost. This loss is not due to any negligence by the applicant. On November 14, the applicant filed an Application for Indemnity or Service Inquiry with Canada Post Corporation. Such an application initiates a trace internally for the contents of the package. However, the applicant has not received an official response from Canada Post Corporation.

• • •

22. The Board has previously considered applications for certification where an applicant did not file membership evidence in its original form. In *Praetor Enterprises Limited*, [1983] OLRB Rep. Apr. 592, the Board listed an application for hearing and stated that the purpose of the hearing was as follows:

Applications made pursuant to the construction industry provisions of the *Labour Relations Act* normally do not require that a hearing be held by the Board. In the present instance, the Board has not received the evidence of representation in support of this application nor has it received a Form 80 as required by the Board's Rules of Procedure. The position taken by the applicant trade union is that prior to the terminal date, the evidence of membership and the Form 80 were sent by registered mail to the Board. The Board has not yet received these documents. In these circumstances, the Board directs that the Registrar list this matter for hearing. At the hearing in this matter, the Board will hear *viva voce* the evidence of the applicant trade union concerning the mailing by registered mail of the evidence of membership and the Form

80. The Board will then base its decision in this application for certification on that evidence.

At the hearing a business representative of the applicant gave evidence that he handled the application for certification and that he mailed by registered mail to the Registrar an envelope containing certain membership documents and a Form 80, Declaration Concerning Membership Documents, Construction Industry. In support of this statement he presented a registration receipt from Canada Post for March 28, the date on which he mailed the letter, listing amongst other things, a letter sent by registered mail to the Registrar. The business representative also filed with the Board photocopies of five membership documents enclosed in the envelope. The business representative testified that the applicant had instituted a search with Canada Post on April 12. As of the date of hearing, the search had revealed nothing further about the missing envelope. The Board accepted the evidence of the business representative that the documents referred to were mailed by registered mail prior to the terminal date of the application. The Board specifically found that the applicant had filed and recited the details of the membership evidence as set forth on the photocopies. In *The Norfolk County Board of Education*, [1974] OLRB Rep. March 182, the Board commented upon a situation where photocopies of membership evidence were filed without being disclosed in advance. At pages 183 and 184, the Board stated as follows:

4. The Board has examined with some concern the evidence of membership filed by the applicant in support of its claim for bargaining rights. They are photocopies of documents that purport to indicate that the undersigned in each case is an office employee in the employ of the respondent, that each is a member of the applicant trade union, and that the required initiation fee was paid. Save in two circumstances, the signatures purport to reflect copies of the counter-signature of the treasurer of the applicant and a date appears on each of the documents described herein. In the case of two documents, the signature of the treasurer seems to have been penned in after the photocopies were taken.

5. The Board usually relies on the "best evidence" in accepting documents indicating the voluntary wishes of employees to be members of a trade union. The Board relies heavily on such evidence and normally accepts documents indicating membership in a trade union at face value. In this regard such reliance is usually predicated upon the filing of the authentic, original membership cards. The Board imposes such strict standards with respect to the acceptability of such evidence in order to avoid the onerous task of requiring oral testimony of each and every person who purports to be a member of a trade union pursuant to an application for certification. In short, the practice of the Board in satisfying itself of the true and voluntary wishes of employees who desire to be members of a trade union is to rely on "the best evidence" available.

6. The hazard of accepting photocopy evidence is indicated in the two instances referred to in paragraph #4 herein. In those instances, the signature of the treasurer is handwritten on two cards. That is to say, in those examples the photocopies are not a true replica of the original cards. It is noted that this matter was not disclosed in the Form 8 [now Form 9], Declaration Concerning Membership Documents. It follows, therefore, that for the Board to accept the membership evidence filed by the applicant we would have to condone an obvious (whether intended or not) misrepresentation. The Board, therefore, does not hesitate to set aside all of the applicant's evidence of membership.

7. In order that the Board's decision be not misunderstood, it wishes to add the following for the applicant's benefit. The Board, in most circumstances, will require that documents purporting to be membership cards be filed in their original form. Nevertheless, there may very well be circumstances where photocopy evidence may be the only evidence available for purposes of establishing a claim to representative rights. In such instances, the Board is of the opinion that the matter of the photocopy evidence should be disclosed in advance and that the applicant be prepared, at the hearing, to establish the authenticity of such evidence.

8. The application is therefore dismissed.

23. In the instant application, the applicant seeks to rely on the best evidence available and has adopted the advice of the Board set forth in *The Norfolk County Board of Education*. The facts set forth by the applicant have not been challenged by the respondent. The respondent had the opportunity to cross-examine the declarant of the Form 9. The photocopies of the membership evidence which the applicant has filed are in writing and are signed by the employee. The applicant is relying on secondary evidence. In *The Law of Evidence in Civil Cases 1974*, by *Sopinka and Lederman*, the authors set out at page 281 the circumstances under which secondary evidence is admissible as follows:

Secondary evidence may be admitted when the court is satisfied that the original document existed and it has been lost or destroyed. Proof of its loss or destruction need not be made by direct evidence but may be proved presumptively by showing that a reasonably diligent search has been made in the places where the document was likely to be found. Whether the inference of loss will be drawn by the court depends upon the sufficiency of the evidence of the search made to find it.

See also *Re Beukenkamp et al. v. The Minister of Corporate Affairs* (1974), 43 D.L.R. (3d) 118, where the Federal Court ruled that a photocopy of a share purchase note was admissible in evidence upon satisfactory proof of the destruction of the original or loss of the original by showing it cannot be found after a diligent search. The issue of copies of originals has also been recently considered by the British Columbia Supreme Court in *Beatty v. First Exploration Fund 1987 and Company, Limited Partnership* (1988) 25 B.C.L.R. (2d) 377 where the court considered a partnership agreement which provided that proxies should be "written" and "signed by the appointor". Some of the proxies had been faxed in a timely manner. The court observed that the law had to take cognizance of technological advances in means of communication and that a faxed copy was essentially a photocopy of the original and should be considered as both "written" and "signed".

24. The applicant is faced with the loss of its original membership evidence through no fault of its own. The applicant has searched diligently and has done all in its power to find the original membership cards. The Board does not agree that in these circumstances the application ought to be dismissed with the applicant being left to contemplate whether it will re-sign the employees who signed the lost membership cards.

While accepting the photocopies as satisfying the requirements for evidence of membership in the above case, the Board emphasized that it will ordinarily require the best evidence available, namely the original evidence of membership.

19. In arguing that the Board should not rely on the photocopied membership evidence in this case, counsel for the respondent submitted that we should not believe Ms. Picard when she says she filed the original membership cards with the Board. He notes that the searches which Ms. Picard made are not consistent with her evidence that she sent the original cards to the Board. Counsel suggests that her evidence was influenced by a concern of adverse employment consequences. Even if one assumed Ms. Picard's evidence to be true, counsel argues that the applicant is no better off. He points to the facts in the *American Barrick* decision in contrast to what occurred here and submits that this applicant did not do enough to satisfy the Board's requirements. Counsel argues that the applicant did not investigate the loss of the original cards as thoroughly as it should have. He also submits that the applicant should have filed an amended Form 9 once it became aware of the situation in order to provide the Board with the best evidence possible.

20. After hearing the evidence of Ms. Picard, the Board finds that she did place the original membership evidence in the envelopes and sent that evidence to the Board by registered mail. However, the original membership evidence was not placed in the Board's file and the only membership evidence the Board has is the photocopied membership evidence and the Form 9. Should the Board rely on the photocopies in the circumstances of this case?

21. As the *American Barrick* decision and the cases cited therein indicate, the Board usu-

ally requires membership evidence to be filed in its original form since the Board's practice in satisfying itself of the wishes of employees is to rely on the "best evidence" available. Where the photocopied evidence of membership is the only evidence available, the Board may rely on this evidence if it is satisfied that the applicant has established the authenticity of its evidence. Whether the Board will be prepared to accept photocopied membership evidence will be dependent on the facts before it in each case.

22. The Board is satisfied that the membership evidence has been lost through no fault of the applicant. The Board is also satisfied that the photocopies which were filed in a timely way are photocopies of the original membership evidence. Counsel for the respondent argues that the applicant should have filed an amended Form 9 once it became aware that the original cards were lost. In our view, it was not necessary for the applicant to file an amended Form 9 in the circumstances of this case. It sent its Form 9 with the original membership evidence and with the photocopies and there is no reason to conclude that the proper Form 9 enquiries were not made. In the circumstances of this case, the Board is prepared to rely on the photocopied evidence filed by the applicant.

23. The evidence of the membership which has been filed by the applicant, although mechanically reproduced, is in writing as required by section 73(1) of the Board's Rules of Procedure. On the evidence before it, the Board is satisfied that the evidence of membership establishes that the persons, on whose behalf the evidence of membership has been filed, have applied for membership in the applicant and have paid to the applicant on their own behalf an amount of at least one dollar in respect of initiation fees in the applicant. The Board is therefore satisfied that these persons are members of the applicant within the meaning of section 1(1) of the *Labour Relations Act*.

The Bargaining Unit Description

24. The parties were unable to reach complete agreement on the bargaining unit description. The underlined portions of the following description highlight the disputed areas:

all employees of the respondent *at its Airline Services Division* in Gloucester, save and except *supervisors/assistant manager*, persons above the rank of *supervisor/assistant manager*, office staff, chef, and *sous-chef*.

25. The applicant takes the position that persons employed as supervisors and sous-chefs do not exercise managerial functions within the meaning of section 1(3)(b) of the Act. The respondent takes the opposite position. Having regard to the agreement of the parties, the Board hereby appoints a Labour Relations Officer to inquire into and report back to the Board with respect to whether or not the persons listed in paragraph 3(b) of the Board Officer's Report exercise managerial functions within the meaning of section 1(3)(b) of the Act.

26. The applicant seeks a unit that includes all employees of the respondent in Gloucester while the respondent maintains that the appropriate unit should be described as all employees of the respondent at its Airline Services Division. The employees whom the applicant seeks to represent are employed at the in-flight kitchen at the Ottawa Airport. They are involved in the preparation and delivery of food for the airlines using that airport. This is the only location from which the respondent operates a business in the City of Gloucester.

27. The respondent has seven operating divisions which carry on business under the following names: Swiss Chalet, Harveys, Steak & Burger Restaurants, Airline Services, Retail Stores, Air Terminal Restaurants, and Days Inns. Each division operates as a separate profit centre and

reports through its own management structure. The labour relations history and the way it has been certified in the past is by operating division. In 1970, this Board certified the respondent for "all employees of the respondent in its Airline Services Division working at or out of the Flight Kitchens at Malton". The respondent has twenty collective agreements in Ontario, with at least eight trade unions and all of these bargaining relationships are by division.

28. Counsel for the respondent recognized that the Board's usual practice is to certify for a municipal-wide unit where an employer operates from only one location in a municipality. Counsel argued that the Board should not rely on this practice in this case having regard to its particular circumstances. Counsel noted that the divisions have been in existence for some time, are quite distinct from each other and operate separately. Counsel relies strongly on the fact that all of the respondent's collective bargaining relationships are along divisional lines which for him illustrates the separate bargaining interests. Counsel in effect argued that a certificate which did not recognize the respondent's divisions could only impact adversely on collective bargaining should another division begin to operate in the City of Gloucester.

29. Counsel for the applicant argued that the circumstances of this case should not cause the Board to depart from its usual practice. In counsel's view, the employees working for the respondent at its in-flight kitchen would have a community of interest with employees employed in at least some of the other divisions. In order to protect and give stability to its bargaining rights, counsel submitted that the unit should include all employees in the City of Gloucester. In support of his position, counsel relied on the following cases: *Intercity Foods Services Inc.*, [1977] OLRB Rep. Dec. 824; *T. Eaton Company Limited*, [1984] OLRB Rep. March 530; and, *Hunter Douglas Canada Limited*, [1985] OLRB Rep. April 535.

30. The Board is satisfied in the circumstances of this case that the bargaining unit should be defined as: all employees of the respondent at its Airline Services Division in Gloucester. By defining the bargaining unit in this way, the applicant does obtain municipal-wide bargaining rights. The issue in dispute between the parties is whether the bargaining rights will attach to all of the respondent's divisions or only one of them. In our view, it is appropriate in this case to limit the municipal-wide bargaining rights to the business the respondent now operates in Gloucester. The respondent's divisions operate separately, each with its own managerial structure. Each division is different to the extent that we are not satisfied that employees in each division would share a community of interest. Of most significance is the collective bargaining history of the respondent. The respondent has a considerable number of bargaining relationships with different trade unions, all of which are along divisional lines. The applicant's proposed unit could lead in the future to bargaining difficulties. In this connection, we refer to the following comments of the Board in *VS Services Ltd.*, [1987] OLRB Rep. June 931, which deal with bargaining units in the food service industry:

12. In the instant case, the evidence establishes that client-specific bargaining units have become the norm in this industry. Moreover, Ms. Kelman's evidence concerning the wide variance in the respondent's industrial dining division operations, and in the terms and conditions of employment which reflect the varied needs of individual clients (confirmed, in the instant case, by the evidence adduced before the Board Officer with respect to the respondent's Eaton Yale and Navistar locations), demonstrates that this norm reflects the labour relations and competitive realities of the industry. As submitted by counsel for the respondent, the inclusion of such disparate operations in a single bargaining unit would tend to place an undue strain on the collective bargaining process by creating a situation in which the Union would likely attempt to enshrine in a collective agreement specific terms and conditions of employment suitable to a particular location, while the employer would likely attempt to negotiate highly general provisions reflecting the "lowest common denominator" among the wide variety of potential services which it could be called upon to provide for future (and existing) clients.

31. The facts before us are quite different from those before the Board in *Hunter Douglas Canada Limited, supra*. The nature of the industry involved here and the unique circumstances lead us to accept the respondent's position.

32. The Board has determined that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of the disputed classifications referred to in paragraph 25. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 28, 1991, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) [formerly section 103(2)(j)] of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

33. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, certifies the applicant, on an interim basis, as the bargaining agent for all employees of Cara Operations Limited at its Airline Services Division in Gloucester, save and except office staff and chef, and, pending the resolution of the bargaining unit description, supervisors/assistant manager, persons above the rank of supervisor/assistant manager, and sous-chef.

34. A formal certificate must await the final determination of the appropriate bargaining unit.

APPENDIX

FILE NO. 2658-91-R

FORM 6

LABOUR RELATIONS ACTNOTICE TO EMPLOYEES OF APPLICATION FOR CERTIFICATION
AND OF HEARING
BEFORE THE ONTARIO LABOUR RELATIONS BOARDBetween:Hotels, Clubs, Restaurants, Taverns, Employees
Union, Local 261,

Applicant,

- and -

Cara Operations,

Respondent.

TO THE EMPLOYEES OF

Cara Operations

1. TAKE NOTICE that the applicant, on NOVEMBER 12, 1991, made application to the Ontario Labour Relations Board for certification as bargaining agent of employees of Cara Operations in the following unit claimed by the applicant to be appropriate:

"All employees of the respondent at Cara Operations Ottawa International Airport, Ottawa, Ontario save and except the Manager, Assistant Manager, Chef, Office Staff all persons above the rank of Assistant Manager."

2. AND TAKE NOTICE that the hearing of the application by the Board will take place at the Office Of The Official Examiner, 901 - 200 Elgin St., Ottawa, Ontario, on THURSDAY, the 19TH day of DECEMBER, 1991, at 9:30 o'clock in the forenoon. (Local Time)

SEE EXPLANATORY NOTICE ON PAGE 2.
CONSULTEZ L'AVIS EXPLICATIF À LA PAGE 2.

THE PURPOSE OF THE HEARING is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to the application referred to in paragraph 1.

3. The Board has fixed THURSDAY, the 28TH day of NOVEMBER, 1991, as the TERMINAL DATE for this application.

4. (1) The Board will not hear evidence or representations of employees objecting to certification of the applicant unless one or more documents, sometimes referred to as petitions, expressing objection to the certification of the applicant are filed with the Board.

(2) A document referred to in subsection (1),

(a) must be signed by the objecting employee or employees;

FORM 6

(b) must be,

- (i) received by the terminal date if sent other than by registered mail, or
 - (ii) mailed to the Board by the terminal date shown in paragraph 3 if sent by registered mail; and
- (c) must be accompanied by the name of the employer concerned and the return mailing address of the employee or employees filing the document or of the representative of the employee or employees, including the Board File Number.

(3) The objecting employee or employees or a representative of the objecting employee or employees MUST ATTEND THE BOARD'S HEARING AND PRODUCE A WITNESS OR WITNESSES who, from personal knowledge and observation, can describe the circumstances in which each document was prepared, circulated and signed, and verify each signature.

No oral evidence of employee objection to certification of the applicant will be accepted by the Board except to identify and substantiate written evidence which complies with these requirements.

5. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

6. (Where the applicant is a council of trade unions) AND FURTHER TAKE NOTICE that the applicant has filed with the Registrar certain documents upon which it intends to rely to satisfy the Board that each of the trade unions that is a constituent union of the council has vested appropriate authority in the council to enable it to discharge the responsibilities of a bargaining agent. These documents are available for inspection at the offices of the Board, 400 University Avenue, Toronto, Ontario, during business hours.

7. Other relevant statements, if any:

N/A

~~YOUR ATTENTION IS DIRECTED TO THE ACCOMPANYING EXPLANATORY "NOTICE TO EMPLOYEES".~~

Please be advised that Mr. William Jackson, a Board Officer from the Ontario Labour Relations Board, will convene a meeting of the parties to this Application for Certification at the Office Of The Official Examiner, 901 - 200 Elgin St., Ottawa, Ontario, on THURSDAY, DECEMBER 12, 1991, at 09:30 A.M. (Local Time)

The purpose in attending the officer's meeting will be to address all questions that may be raised in connection with the appropriateness for collective bargaining purposes of the unit(s) proposed in the application and any reply, the membership support for the union, and such other issues as may arise as a result of the application filed. This meeting may result in the Board issuing a decision in this matter without an oral hearing on the basis of agreements reached between those attending the meeting.

DATED this 20th day of November, 1991.

T. A. Inniss

T. A. Inniss

Registrar
Ontario Labour Relations Board

FORM 6

NOTES

I. All communication should be addressed to:

The Registrar
 Ontario Labour Relations Board
 4th Floor
 400 University Avenue
 Toronto, Ontario
 M7A 1V4

II. The requirements set out in paragraph 4 of this notice relate only to evidence of employee objection to certification of the applicant trade union. If you attend at the Board's hearing and wish to make representations about something other than employee objection to certification of the applicant, paragraph 4 does not apply. However, your attention is directed to section 72 of the Board's Rules of Procedure which applies in such situations and provides, in part, as follows:

72. (1) Where a person intends to allege at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

.

(b) file a notice of intention that shall contain, a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included ... in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it thinks advisable.

.

1988-91-JD Millwright District Council of Ontario, Local 1410, Applicant v. **E. S. Fox Ltd.** and Sheet Metal Workers International Association, Local 269, Respondents v. Ontario Sheet Metal and Air Handling Group, Intervener

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board noting general tendency by parties to submit “boiler plate” briefs lacking in particularity in complaints with respect to assignment of work - Board observing that this approach not only retards and undermines pre-hearing process, but also tends to unnecessarily prolong and complicate the hearing of such a complaint

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Balentine*.

DECISION OF THE BOARD; February 17, 1992

1. This matter was scheduled to be pre-heard by this panel on January 30, 1992. That morning, the parties agree to adjourn the pre-hearing conference “to a date to be fixed by the Board in consultation with the parties”.

2. Having regard to the agreement of the parties, the pre-hearing conference was adjourned. It is to continue (begin actually, since it is not yet begun) on a date or dates to be fixed by the Registrar. Whether the Registrar consults with the parties in that respect is left to her discretion. We note that this is the second time the pre-hearing conference has been adjourned. The parties’ conduct demonstrates that delay is not a concern (to them) in this matter.

3. We wish to comment on one further matter. In preparing to conduct the pre-hearing conference, the panel read the pre-hearing briefs submitted by the parties. We found all of them to be deficient.

4. In its brief, the complainant pleads, at paragraph 14, that:

The factors of skills, training experience and qualifications favour an assignment of the work in dispute to the Millwrights. In particular, the work in dispute is very unique and highly specialized. Members of the Millwrights have performed identical work on two previous occasions for the employer and have developed the special skills and experience to perform the work in dispute.

What skills, training, experience or qualifications do the complainant’s members have which favour an assignment of the work to them? What is it about the work in dispute which is unique and specialized, and which favours an assignment to members of the complainant? When, where and in what circumstances have members of the complainant performed identical work on two previous occasions for the employer?

5. In paragraph 16 of its brief, the complainant pleads that:

The employer E. S. Fox has performed the Work in Dispute on a total of two other occasions. Both times the employer used exclusively Millwrights to perform the work in dispute.

Again, particulars are lacking. When, where and in what circumstances was the work performed? It is not generally sufficient to merely refer to a document contained elsewhere in the brief in that respect, and, in this case, the document referred to is itself both marked as a “draft” and not completely legible.

6. In paragraph 17 of its brief, the complainant pleads that:

It is submitted that area and industry practice support the assignment of the work in dispute to the Millwrights. In particular, work of a similar nature was assigned to the Millwrights.

Was the work referred to the same or merely similar? If it was “similar”, how was it different, and how was it the same from the work in dispute in this case? What are the particulars of the area and industry practice relied upon by the complainant? That is, what was the work and the nature of the project where it was done? When was it done? Where was it done? Who was the employer which assigned the work? Was the work done on a sub-contract? With which trade union(s) did all of the companies involved have collective agreements?

7. In the brief submitted by the respondents Sheet Metal Workers International Association, Local 269 and Ontario Sheet Metal Workers’ & Roofers’ Conference (the “Sheet Metal Workers”), they plead at paragraph 10 that:

It is the practice of the Respondent E. S. Fox Ltd. to assign the Work in Dispute to the Sheet Metal Workers. On at least two prior occasions, the installation of a furnace at Alcan Canada Ltd. has been performed by Sheet Metal Workers.

In what way was the work involved in the “installation of a furnace of Alcan Canada Ltd.” like the Work in Dispute herein? When and where was the work done? Who assigned the work? With which trade union(s) that the assigner of work have a collective agreement?

8. In paragraphs 11 and 12, the Sheet Metal Workers plead that:

The Work in Dispute at the Project should be performed by employees experienced in doing work of this nature. Since Sheet Metal Workers members have always been associated with the Work in Dispute and other similar work, they are more qualified to perform the same than are members of Local 1410.

Throughout the province of Ontario, including OLRB Geographic Area #29, it is the well established practice of employers bound to the Sheet Metal Workers’ Collective Agreement to assign the Work in Dispute to members of the Sheet Metal Workers. They have the skills, ability, experience and qualifications to perform such work in a competent and efficient manner.

What “similar” work is of relevance? What training, skills, ability, experience or qualifications do members of the Sheet Metal Workers have which favours the assignment of the Work in Dispute herein to them?.

9. In paragraph 15, the Sheet Metal Workers plead:

It is the practice of employers bound to the Sheet Metal Workers’ Collective Agreement throughout the province of Ontario, including Board Area #29, to use Sheet Metal Workers to perform the Work in Dispute. As such, the Millwrights demand for the work is disruptive of industrial relations stability in the province.

What are the particulars of the practice being pleaded? Is the practice relied upon by employers bound to a Sheet Metal Workers’ Collective Agreement as well as to a collective agreement with the complainant? In what way is the complainant’s demand for the Work in Dispute disruptive of industrial relations stability?

10. The respondent employer’s brief is similarly lacking in particularity, especially in paragraphs 3, 5, 6 and 7.

11. The above is intended to be illustrative rather than exhaustive. Further, it illustrates not only the deficiencies in this instance but also a general tendency by parties to submit "boiler plate" briefs in complaints with respect to the assignment of work. This approach is both counter productive and not in keeping with either the intent or letter of Board Practice Note #15. It not only retards and undermines the pre-hearing process, but also tends to prolong and complicate unnecessarily the hearing of such a complaint.

12. Both these parties and the labour relations community in general would be well advised to submit properly particularized briefs. They may find the Board to be less receptive to boiler plate briefs which do little to define the parameters of the dispute or the litigation. They will almost certainly find that the pre-hearing process will be more constructive and that the litigation itself, if required, will be more expeditious if they submit briefs which are properly particularized.

**2526-89-G International Brotherhood of Electrical Workers, Local 894, Applicant
v. Ellis-Don Limited, Respondent**

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed

BEFORE: *Susan Tacon*, Vice-Chair, and Board Members *J. Trim* and *J. Redshaw*.

APPEARANCES: *A. M. Minsky*, *Robert Hill* and *Arlene Huggins* for the applicant; *Roy Filion*, *Frank Angeletti* and *Paul Richer* for the respondent.

DECISION OF VICE-CHAIR, SUSAN TACON AND BOARD MEMBER J. REDSHAW; February 28, 1992

1. This is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*. The parties were agreed that the respondent ("Ellis-Don") had sublet electrical construction work which would be covered by the Provincial ICI Agreement to a "non-union" electrical contractor, i.e., an electrical contractor not bound to the ICI Agreement. The work in question was at the Environmental Science Building, Trent University in Peterborough. It was this subcontract which led to the instant grievance by the applicant ("Local 894, IBEW").

2. The Board notes, as well, the parties' agreement to the substitution of Board Member Trim for Board Member Gibson following his untimely death before the completion of the hearing.

3. In reaching its factual findings, the Board has considered the usual the factors going to credibility and has weighed and assessed the evidence, including the documentary material, in that

context and in the context of what is reasonably probable in the circumstances. As might be expected when witnesses are asked to recollect events almost thirty years in the past, the evidence was somewhat sketchy at times, although, in the Board's view, the witnesses were sincerely trying to recall those events to the best of their ability.

4. Because of the issues involved and the onus with respect to those matters, the parties reached agreement as to the order of proceeding, including the order for written submissions on the admissibility and probative value of the report and supplementary report submitted by G. W. Adams as Special Counsel, to the Minister of Labour dated April 11 and May 1, 1980 (the Adams' reports) which union counsel sought to file with the Board during argument. As well, following completion of the hearing, the Board afforded the parties the opportunity to make representations in writing regarding the impact, if any, on the instant proceeding of the Board decision in *Marineland of Canada Inc.*, [1990] OLRB Rep. Dec. 1298. Before setting out the Board's factual findings, it is appropriate to summarily recount the able and thorough submissions of counsel on all issues.

ARGUMENT

5. Counsel for the union reviewed the evidence in support of his assertion that Tony Evans had signed Exhibit 5, the working agreement dated December 10, 1962 on behalf of Ellis-Don, and that Evans had the actual or, in the alternative, the ostensible authority to enter such an agreement by virtue of his duties and responsibilities as general superintendent for Ellis-Don. Likewise, the working agreement was properly executed by officials of the Building Trades Council ("the Council") on behalf of the Council and its affiliates. Further, even if Evans did not have the requisite authority, counsel argued that Ellis-Don effectively ratified the working agreement through its subsequent conduct in conducting a pre-job conference at the University of Toronto project and hiring tradesmen. Counsel submitted there was no evidence on which the Board could reasonably conclude that Evans signed the working agreement under duress. Counsel asserted the statutory scheme of province-wide bargaining extended those bargaining rights to all affiliated bargaining agents province-wide in the ICI sector of the construction industry. That is, the statutory scheme extended the bargaining rights of Local 353 of the IBEW to the applicant in the instant grievance, Local 894, IBEW. Counsel also argued that whether or not Ellis-Don actually had employees as at December 10, 1962 was irrelevant because the agreement was signed in contemplation of tradesmen being required for the University of Toronto project scheduled to start shortly thereafter. In any event, Ellis-Don could not properly raise such an argument as that was tantamount to relying on its own impropriety as a defence to the working agreement and/or such an argument could not be invoked by an employer on behalf of its employees.

6. With respect to the issue of abandonment, counsel contended that the company had not satisfied its onus of establishing abandonment by Local 353, IBEW prior to 1978. In that regard, it was argued that only the conduct of Local 353 was relevant and not that of other affiliates of the Council during that period. In any event, the evidence of non-union subcontracts on Ellis-Don projects in that period was sketchy and comprised a very minor component of the value of the projects in question. Specifically, there was no evidence of non-union electrical subcontracting in the period from the signing of the working agreement to 1977, when the province-wide bargaining scheme was statutorily imposed. Counsel asserted that Board caselaw had clearly rejected the concept of abandonment of bargaining rights subsequent to the imposition of the statutory scheme. Counsel stressed that the fact that a grievance referral filed by the Teamsters against Ellis-Don in 1980 relying on the 1962 working agreement was withdrawn because the applicant was unable to prove the signatory on behalf of the company in that document and did not constitute prejudice to the company as there was no claim for relief in the period from that withdrawal to the filing of the

instant grievance. Nor could that withdrawal constitute an abandonment for all time by all the Council affiliates of their right to seek to prove the 1962 working agreement. In summary, counsel asked that the grievance be upheld.

7. Counsel referred to the following cases: *Scherer v. Paletta*, [1966] 2 O.R. 524 (CA); *Inspiration Limited*, [1967] OLRB Rep. Sept. 561; *Sentinel Reliance Products Limited*, [1973] OLRB Rep. Jan. 7; *Whitney Maintenance*, [1973] OLRB Rep. Jan. 26; *Re Canada Labour Relations Board and Transair Ltd.*, (1976) 67 D.L.R. (3d) 421 (SCC); *G.M. Gest Limited*, [1978] OLRB Rep. Aug. 747; *Canadian Laboratory Supplies Ltd. v. Engelhard Industries of Canada Ltd.*, (1979) 97 D.L.R. (3d) 1 (SCC); *Rockland Industries Inc. v. Amerada Minerals Corporation of Canada Ltd.*, (1980) 108 D.L.R. (3d) 513; *Vic Starchuk & Associates Inc.*, [1980] OLRB Rep. April 516; *Napev Construction Limited*, [1980] OLRB Rep. June 862; *Newman Bros. Limited*, [1981] OLRB Rep. June 750; *Culliton Brothers Limited*, [1982] OLRB Rep. Mar. 357; *Nicholls-Radtke & Associates Limited*, [1982] OLRB Rep. July 1028; *M.J. Guthrie Construction Limited*, [1982] OLRB Rep. Sept. 1332; *M.J. Guthrie Construction Limited*, [1983] OLRB Rep. April 576; *M.J. Guthrie Construction Limited*, [1984] OLRB Rep. Jan. 50; *City Plumbing (Kitchen-ener) Limited*, [1985] OLRB Rep. Nov. 1566; *Distribulite Ltd. et al v. Toronto Board of Education Staff Credit Union Ltd. et al*, (1987) 62 O.R. (2d) 225; *Eighty-Five Electric*, [1987] OLRB Rep. June 833; *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405; *Cumberland Properties Ltd. v. The Minister of National Revenue*, [1988] 88 DTC 6284; *Harbridge & Cross Limited*, [1988] OLRB Rep. April 391; *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523; *Paccar of Canada Ltd. (Canadian Kenworth Company Division) v. Canadian Association of Industrial, Mechanical & Allied Workers, Local 14 et al*, (1989) 62 D.L.R. (4th) 437 (S.C.C.); *Harbridge & Cross Limited*, [1989] OLRB Rep. July 824 (judicial review application dismissed); *Harbridge & Cross Limited*, [1989] OLRB Rep. Oct. 1093 (leave to appeal refused); *Steelfabco Inc.*, [1990] OLRB Rep. Jan. 83; *Arlington Crane Service Limited et al v. Ontario Minister of Labour et al*, [1988] 89 CLLC ¶12,133 (Ont Supreme Ct.); *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776; *J.C. Milne Const. Co. (Canada) Inc.*, [1979] OLRB Rep. Mar. 220; *Metropolitan Toronto Sewer and Watermain Contractors Association*, (Board Files 1533-88-R, 1534-88-R, unreported, August 28, 1990). (Hereafter, reference to *Harbridge & Cross Limited*, *supra* is to the initial Board decision at [1988] OLRB Rep. May 523).

8. Counsel for the respondent reviewed the evidence. He asserted that the evidence supported the proposition that Tony Evans had neither the actual nor the apparent authority to sign the working agreement on behalf of Ellis-Don and, hence, the document was never binding on the respondent. Further, it was argued that one would reasonably infer from the direct and circumstantial evidence that the working agreement was signed by Tony Evans under duress. Indeed, counsel contended that the Building Trades Council's entire method of operation (i.e., recognition picketing of job sites) was such that no working agreement could be freely signed in that era. In the alternative, given the Board's jurisprudence, the working agreement was invalid as a matter of law as there were no employees in the bargaining unit at the time the agreement was signed and, specifically, the working agreement could not be characterized as a "pre-hire" agreement with respect to electricians. If the Board found that the working agreement was valid and created bargaining rights, counsel submitted that the document was never intended to create bargaining rights for Local 353, IBEW since Ellis-Don never intended to hire electricians directly and, indeed, on the evidence, has never hired electricians directly in fact. That is, it was contended that the evidence, at most, evinced an intention of Ellis-Don to grant voluntary recognition to only those unions which represented tradespersons who would be direct hires of the respondent. In this regard, counsel stressed that Ellis-Don's name did not appear in any of the Board accreditation orders except those of the civil trades. As well, counsel emphasised that no evidence was led by Local 353 to explain why Ellis-Don did not appear on schedule E or F in the Board accreditation order issued in

1975 for the Electrical Contractors Association of Toronto. The only reasonable inference, it was argued, was that, at the time Local 353 completed the requisite forms in connection with the accreditation application, Local 353 did not believe it possessed bargaining rights grounded on the working agreement. Counsel requested the Board to revisit *Harbridge & Cross, supra*, given that there was no relevant accreditation order in that case, as here, and that paragraph 5 of the working agreement referred to the existing Builders' Exchange, the predecessor of the Toronto Construction Association (the "TCA") noted in the *Harbridge & Cross* case. That is, only the six civil trades had collective agreements with the Builders' Exchange. Counsel rhetorically queried how paragraph 2 of the working agreement could create bargaining rights as between Ellis-Don and Local 353 when Ellis-Don had never hired Local 353 members. Paragraph 3 of the working agreement, dealing with sub-contracting, it was contended, could not be characterized as a recognition clause creating bargaining rights. Finally, with respect to *Harbridge & Cross, supra*, counsel asserted that the fact that the Divisional Court did not quash the decision reflected curial deference to Board decisions rather than a "stamp of approval" of the Board's reasoning therein. Counsel then proceeded with a detailed exposition of the "construction" provisions of the Act, including the sequence of amendments, in support of his proposition that the Legislature never intended to have bargaining rights created by the type of working agreement before the Board in the instant case.

9. Counsel also asserted that, should the Board find bargaining rights were created in some fashion, whatever bargaining rights were created were abandoned prior to the introduction of the statutory scheme for province-wide bargaining in 1977. In that regard, the absence of Ellis-Don's name from the accreditation order noted above was critical particularly given the absence of any explanation for the failure of Local 353 to include Ellis-Don on schedule E or F in that application. Counsel noted that abandonment is a question of fact and urged the Board to find abandonment in the instant case. In the final alternative, counsel argued that bargaining rights had been abandoned subsequent to 1978. Counsel reviewed the documentation on the subcontracting of various work on Ellis-Don projects tendered in evidence. The Board jurisprudence that bargaining rights with respect to a provincial agreement cannot be abandoned was directly challenged particularly in the context of the recent Board decision regarding *Ontario Hydro, infra*. It was submitted that abandonment by one or more affiliated bargaining agents should bind the employee bargaining agency as the latter was a legal fiction, an agent of the former. In the instant case, there was a pervasive pattern of inaction by the applicant and the other affiliated bargaining agents on a province-wide basis for many years. Counsel submitted it was unfair and improper to utilize a 1962 working agreement to create bargaining rights for the applicant where Ellis-Don had never employed electricians. To do so would be tantamount to giving the IBEW voluntary recognition with respect to non-existent employees. Counsel argued that voluntary recognition should be restricted to circumstances where certification was a possible route to bargaining rights. Otherwise, it was emphasised, the IBEW would be able to do indirectly (through voluntary recognition grounded in the 1962 working agreement) that which it could never have accomplished directly through certification as there had never been any employees of Ellis-Don to organize.

10. Cases cited included: *Collegiate Sports Ltd.*, [1977] OLRB Rep. Aug. 487; *Hussey Seating Company (Canada) Limited*, [1981] OLRB Rep. Aug. 1138; *Sunrise Paving and Construction Co. Ltd.*, 72 CLLC ¶16,060; *C. Strauss (1973) Limited*, [1975] OLRB Rep. July 581; *Nicholls-Radtke & Associates Limited*, [1982] OLRB Rep. July 1028; *Gerald Davidson Plumbing & Heating Limited*, [1984] OLRB Rep. March 462; *F.D.V. Construction Ltd.*, [1984] OLRB Rep. May 719; *Eighty-Five Electric*, [1987] OLRB Rep. June 833; *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *J.S. Mechanical*, [1979] OLRB Rep. Feb. 110; *John Entwistle Construction Limited (#1)*, [1979] OLRB Rep. March 211; *Hugh Murray Limited*, [1979] OLRB Rep. July 664; *John Entwistle Construction Limited (#2)*, [1979] OLRB Rep. Nov. 1096; *John Murray (1974)*

Limited et al and John Entwistle Construction Limited et al (1980), 33 O.R. (2d) 670; *Eastern Construction Company Limited*, [1989] OLRB Rep. Nov. 1105; *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523; *Edland Construction (1960) Ltd.*, (1963), 39 D.L.R. (2d) 536; *Smith Bros. Construction Co. Ltd.*, [1955] 4 D.L.R. 255; *Acton Excavating and Contracting Limited*, 64 (3) CLLC ¶14,006; *Ontario Hydro*, (1990) OLRB Rep. March 305.

11. In reply, union counsel reiterated his position that Evans had actual, implicit authority or at least ostensible authority to sign the working agreement. Counsel sought to distinguish the cases cited by respondent counsel with respect to “pre-hire” agreements. Further, it was asserted that persons were hired on the University of Toronto job pursuant to the working agreement and, even if Ellis-Don did not intend to hire electricians, the working agreement was valid and covered all trades affiliated with the Council, not just the civil trades. With respect to absence of Ellis-Don’s name on the 1975 accreditation order, counsel suggested that the fact that Ellis-Don was not put forward by the union on Schedule “F” (as a company with whom the union had bargaining rights but who did not employ electricians in the previous year) was not evidence of abandonment. Moreover, it was asserted that factor should not be given weight since the accreditation order was statutorily revoked in 1977 with the inauguration of the province-wide ICI bargaining. Counsel argued the principles established in *Harbridge & Cross*, *supra*, should not be reversed as respondent counsel was seeking. Counsel disagreed with respondent counsel’s interpretation of section 144(4) of the Act and reviewed the relevant legislative history in Bills 22, 17, 204 and 73. Union counsel argued that the discussion of estoppel in *Ontario Hydro*, *supra*, was not relevant to the line of jurisprudence elaborating on the mandatory statutory scheme for bargaining in the ICI sector of the construction industry.

12. In “surreply” as agreed by the parties, respondent counsel stressed that Ellis-Don had never hired electricians directly and this distinguished the instant case from the *Nicholls-Radtke*, *supra*, jurisprudence. Counsel rejected the proffered explanation by union counsel for the absence of Ellis-Don’s name on schedule F of the 1975 accreditation order and asserted there was no compelling explanation for that absence except abandonment. Counsel did not dispute that Bill 73 did not operate so as to confer bargaining rights which were not already present. With respect to *Ontario Hydro*, *supra*, counsel argued that equitable concepts were compatible with the Act and queried the public interest in protecting IBEW bargaining rights vis-a-vis Ellis-Don. Finally, with reference to *Lorne’s Electric*, *supra*, counsel asserted that not to hold the employee bargaining agency responsible for the actions (or inaction) of its affiliated bargaining agencies was tantamount to granting an independent existence to the employee bargaining agent, a status inconsistent with the statutory scheme.

13. With respect to the Adams’ reports, the Board ruled (Board Member Trim dissenting) that the documents were admissible to show the mischief, in Mr. Adams’ view, which existed prior to the amendments in question of the *Labour Relations Act*. Submissions on the probative value of the reports were in writing and, accordingly, need not be reiterated here except in summary form. The essence of the argument by counsel for the union is found in the following excerpt from his written submissions:

In conclusion, the Board ought to accord considerable weight to the Adams Reports which clarify and confirm the purpose and history of the province-wide bargaining legislation and, in particular, its recognition and coverage of bargaining rights created by voluntary recognition agreements, including working agreements. The Adams’ Reports thus have the effect of invalidating the far-reaching and, with respect, anomalous interpretation placed by the Respondent on the scope of the designation provisions of the Act as well as providing the historical context and purpose of Section 144 thereof.

Respondent counsel argued that the Adams' Reports have no probative value, providing no assistance in determining legislative intent.

14. As noted earlier, the Board afforded the parties the opportunity to comment on the impact, if any, of the recent decision in *Marineland*, *supra*. Again, as those extensive submissions were in writing, the Board herein merely highlights the positions taken. Counsel for the union contended that the decision in *Marineland*, *supra*, was internally contradictory and inconsistent with established Board jurisprudence to the effect that bargaining rights cannot be abandoned subsequent to the issue of the statutory designation orders. In the alternative, the evidence before the Board in *Marineland* is not similar or parallel in that there is no evidence of abandonment of bargaining rights by Local 353 prior to 1978. Any non-enforcement of the electrical workers' Provincial Agreement by certain affiliated bargaining agents in the 1980's vis-a-vis the respondent was explained by the evidence led in these proceedings, i.e., the obstacle to proving the identity of the respondent's signatory to the working agreement prior to the summer of 1989. Respondent counsel argued that the *Marineland* decision held that the question of abandonment was one of fact and, in reaching that factual finding, it was appropriate to consider events subsequent to, as well as prior to, the designation orders. Counsel stressed the asserted similarities in the evidence before the Board in *Marineland* and in the instant case. Finally, respondent counsel submitted that the *Marineland* decision was not inconsistent with earlier jurisprudence which held the bargaining rights could not be abandoned subsequent to the designation orders, although counsel also submitted that jurisprudence was now of questionable validity in view of the Board's decision in *Ontario Hydro*, *supra*.

FACTS

15. Ellis-Don is a large general contractor. Ellis-Don originated and initially operated in the London area. In late 1962 the firm won the contract to construct the Zoological Building at the University of Toronto. The \$4 to \$5 million building was considered a substantial project for the time. This contract was the first for Ellis-Don in the Toronto area. Jim Burns, an estimator with the firm, was relocated to Toronto to open an office there in early 1963. His position was Toronto manager; his responsibilities included letting the subcontracts on the University of Toronto project, monitoring performance, scheduling, costs, change orders, and progress billings.

16. Tony Evans joined Ellis-Don in the Fall of 1962 as a general superintendent. He supervised a number of job sites across Ontario including the University of Toronto project, travelling regularly to those sites from the London head office. The various project supervisors on site reported to Evans who assisted in hiring, expediting materials, ensuring schedules were maintained, liaison with client owners and such like. The project supervisor at the University of Toronto site was Jim Peden. While Evans was not authorized to sign commercial contracts on behalf of the company, he did handle labour relations functions including direct hires, grievances, jurisdictional disputes and signing collective agreements and working agreements. Ellis-Don, at that time, hired workers directly for several trades such as labourers, carpenters, bricklayers and masons. Electricians were not hired directly by Ellis-Don at any point; rather, that work was subcontracted. Evans testified he visited the University of Toronto project every week or two from the project's start in late 1962. Evans identified his signature on Exhibit 5, the working agreement dated December 10, 1962, although he could not recall signing the document. He did not recognize the various union signatories to the working agreement except for Albert Hull whom he recalled as the business agent on the site. Evans could not recollect a specific reason for signing the working agreement except that he would likely have signed "to get (union) men". In December, work had not actually started on the project except perhaps for preliminary work; excavation did not commence until late February or early March 1963. Evans could not recall whether a pre-job meeting

had been held on the project nor further comment on that correspondence. Evans left Ellis-Don in August 1963.

17. Burns and Evans met weekly during 1963 until Evans left the company. Burns testified that he never saw Exhibit 5, the working agreement, nor did Evans raise the matter with him after Burns arrived in Toronto as Toronto manager. Burns indicated he let subcontracts for the University of Toronto project and other projects without considering the “union status” of the subcontractors. He did not have any contact with the Building Trades Council during the project to its completion in late 1964. Although Peden reported to Evans with regard to his “line” functions, Peden reported to Burns with regard to “project” functions (such as subcontracts, costs, materials reporting). Burns was shown the correspondence mentioning a pre-job meeting at the University of Toronto site. He could not recall any such meeting although he testified he would have expected to attend any pre-job meetings at the University of Toronto project as Toronto manager. Burns acknowledged that in early 1963 he was just in the process of setting up the Toronto office and might not have been included in these matters for that reason. Burns did state he would have learned of any union grievances concerning the presence of non-union subcontractors on site. Burns could not recall any grievances on the University of Toronto project either concerning subcontractors or direct hires. Finally, Burns testified that the president of Ellis-Don, Don Smith, visited the University of Toronto project perhaps six or seven times.

18. Edward Greeley testified that in the early 1960's he was Assistant Business Manager of the Toronto Building and Construction Trades Council, Albert Hull was Business Manager and George Allan (from Local 721 of the Ironworkers) was Council president. Local 353 of the IBEW was affiliated with the Council. He identified his signature and those of Allan and Hull on the December 10, 1962 working agreement and recalled the document being signed in the Council offices. Greeley remembered meeting with Evans and Peden at the University of Toronto site. He stated he did not know Evans' actual title but knew he (Evans) was Peden's superior and Peden was project manager. Greeley assumed Evans had sufficient authority to sign the working agreement. Greeley could not recollect actually seeing Evans sign the working agreement. Greeley could not remember attending a pre-job meeting although he thought he visited the site two or three times. As to the state of the project in December 1962, Greeley thought the hoarding might have been erected but there were not yet tradesmen on site. Greeley characterized Ellis-Don as having a good working relationship with the Council and could not recall any complaints about Ellis-Don using non-union subcontractors at the Council's executive board meetings.

19. Greeley testified about the structure of the Council in the early 1960's and Council efforts to organize contractors through the signing of working agreements like the one before the Board in the instant case. The Council's counterpart was the Toronto Builders' Exchange, the predecessor of the TCA. Greeley could not recall the arguments used to convince Evans to sign the working agreement but indicated that generally his position was that the Council wanted working agreements signed, that such an agreement would ensure the contractor a supply of skilled men and that, in the absence of a working agreement, labour difficulties might arise, especially if union men had to work along side non-union men. Greeley noted that, in some instances, the Council would not interfere with subcontracts which had already been let if the general contractor signed the working agreement. Greeley could not recall that sort of discussion with Evans. Greeley did have the impression that there was a verbal undertaking by the University to the Council that the job would be union in the interests of good labour relations by a large public institution. It was the responsibility of the various local business agents to police the working agreement, once signed, for their respective trades. The Council would likely get involved if a business agent could not resolve a complaint against a general contractor and raised the matter at a Council executive board meet-

ing. In certain circumstances, the Council would declare a job “unfair” and approve picketing at the job site in an effort to pressure the general contractor.

20. Tony Michaels, business manager/financial secretary of the Council, indicated that the Council, to which Local 353 of the IBEW was affiliated, expanded its jurisdiction to become the Toronto-Central Ontario Building and Construction Trades Council. Local 894 of the IBEW, the applicant in these proceedings, became affiliated to the Council in 1979. In 1980, a section 124 grievance referral brought by the Teamsters was withdrawn because the Ellis-Don signatory to the working agreement could not be identified. Michaels testified that, after he became a Council official in 1986, he initiated a search involving the affiliates and other Councils in the province to identify the Ellis-Don signatory. That process ultimately resulted in the identification of Evans’ signature. Ellis-Don was then put on notice that the Council had identified the Ellis-Don signatory to the working agreement and that the Council considered Ellis-Don bound by the agreement. Michaels conceded that, had the Council earlier exercised due diligence, the identifying documentation would have been unearthed much sooner. Michaels testified that both Hull and Allan, the other union signatories, were deceased. Michaels also testified as to the Council’s practices in the 1960’s regarding recognition strikes and the use of picketing of job sites to get working agreements signed. Michaels added that picketing sometimes occurred without the Council’s knowledge and essentially ceased when the Board proscribed such conduct through cease and desist orders. Michaels agreed with Greeley, that if subcontracts had already been let at the point the general contractor signed a working agreement, the Council might waive compliance with the working agreement’s subcontracting clause for that project. In general, local business agents were responsible for policing job sites in respect of each trade although the Council used “survey teams” on a regular basis to canvas job sites in a designated geographic area, monitoring adherence to working agreements. Local business agents would be unlikely to monitor compliance with a working agreement by a contractor in respect of another trades’ jurisdiction. Pre-job conferences were frequently held to review the project in advance and dealt with manpower requirements, jurisdictional disputes, subcontracts, etc. Michaels testified that general contractors usually subcontracted work other than that of the civil trades but had collective agreements with those six civil trades as those trades were “direct hires”. The Toronto Builders’ Exchange (the predecessor, as noted, to the TCA) negotiated collective agreements on behalf of its members, including Ellis-Don, with these six civil trades but did not have a collective agreement with the IBEW. Michaels conceded that Ellis-Don was a well-known general contractor which has operated throughout the province since the 1960’s; its project sites are readily identifiable.

21. Paul Richer, director of legal and labour relations for Ellis-Don, testified as to the company’s efforts to document its various projects from the early 1960’s onwards. Not surprisingly, evidence of various projects, including the union or non-union status of subcontractors, was sketchy for the early 1960’s. A number of exhibits were filed with the Board breaking out such information as project size, value and type of non-union subcontracts on various projects, particularly in the Toronto area. It was conceded that the value of the non-union subcontract component of Ellis-Don projects over the years has been less than one percent of the project cost and there were no verifiable non-union subcontracts in the Toronto area in the 1962 to 1969 period. Richer testified that Ellis-Don was bound by collective agreements to the civil trades in the ICI sector (namely, carpenters, labourers, operating engineers, operative plasters and rodmen) but could not determine when and how Ellis-Don first became so bound. Further, in 1975, the Board certified the International Association of Bridge, Structural and Ornamental Ironworkers Local 721. In 1986, the International Union of Bricklayers and Allied Craftsmen and Local Union 7 Canada were certified for marble masons, tile layers and terrazzo workers. Ellis-Don also has an agreement with the Formwork Council.

22. Bruce Binning, a partner with the law firm of Mathews, Dinsdale, has acted as counsel for the General Contractors section of the TCA for many years. He testified that the predecessor Toronto Builders' Exchange historically negotiated collective agreements with the six civil trades; generally those trades were direct hires and other work was subcontracted. Binning indicated that he was familiar with the accreditation legislation and acted as TCA counsel in respect of a number of accreditation applications. He stated that Ellis-Don's name appeared in the accreditation orders only with respect to the civil trades. Binning added that the general contractor members of the TCA were advised over the years to indicate, in their interventions if named by a union applicant, that no bargaining rights existed except for the six civil trades. He testified that a few general contractors had bargaining relationships with more than the six civil trades but very few general contractors ever employed electricians directly. Binning was not aware of any accreditation applications beyond those involving the civil trades where the source of bargaining rights relied on was a working agreement type of document.

DECISION

23. The Board has roughly grouped the various issues under three headings, the working agreement, the "reach" of the working agreement and abandonment/estoppel. While the three groupings are useful for analytical purposes, it is recognized that the issues are not amenable to rigid compartmentalization.

THE WORKING AGREEMENT

24. The Board is satisfied that Exhibit 5, the working agreement, was signed by Evans on behalf of Ellis-Don and by Allan, Hull and Greeley on behalf of the Council on or about December 10, 1962. It appears likely that the document was initially signed by Evans and, some few days thereafter, the Council officials affixed their names rather than the document being executed by all parties at the same meeting. Such a brief delay would explain the reference in the executive board minutes of December 13, 1962 wherein Greeley reported that Evans and Peden agreed to sign the working agreement but did not report the working agreement as having yet been signed. It is not unexpected that, after almost thirty years, the recollection of Greeley and Evans would have faded. However, Evans clearly identified his signature; Greeley not only identified the signatures of the Council officials but recollected meeting Evans at the University of Toronto site and the latter's willingness to sign a working agreement. As well, there is some correspondence between Hull and Evans regarding a pre-job conference at the Zoological Building Project. Taken together, the Board finds the evidence is sufficient to constitute proof of the execution of the working agreement.

25. Respondent counsel argued that Evans did not have the authority to sign the working agreement on behalf of Ellis-Don. With respect, the Board does not agree. As noted above, Evans was the general superintendent of Ellis-Don responsible for the University of Toronto project, among others. Peden, the project superintendent, reported to Evans. The Board need not recount herein the duties and responsibilities outlined earlier except to emphasise that Evans was responsible for labour relations for Ellis-Don at its various projects. Evans testified that he had signed other working agreements and collective agreements on behalf of Ellis-Don. In the Board's view, the fact that Evans could not, under the company's corporate structure, sign commercial contracts is not determinative of his authority vis-a-vis labour relations. The Board is satisfied that Evans had actual authority to sign the working agreement on behalf of Ellis-Don implicit in his duties and responsibilities for the firm. It was reasonable for Greeley to assume Evans, Peden's superior, possessed the requisite authority to bind Ellis-Don to the working agreement given his (Evans) position in the Ellis-Don hierarchy and his functions. Thus, the Board finds the working agreement

was properly executed by Evans acting on behalf of Ellis-Don and binds the company. The fact that Evans apparently did not tell Burns or others at Ellis-Don of the signing of the working agreement may well be unfortunate but does not serve to release Ellis-Don from its obligations. In reaching its conclusion, the Board has reviewed the various authorities cited by both counsel. The Board does not consider it necessary to recount those authorities in detail. Rather, the Board considers its finding consonant with the principles expressed therein. The Board would note that the circumstances in *Inspiration Limited*, *supra*, and *Vic Starchuk and Associates Inc.*, *supra*, are particularly apposite, although the latter case also dealt with the question of ratification. Conversely, the senior position of Evans within the company and his duties and responsibilities are not analogous to those in *Collegiate Sports*, *supra*, or in *Hussey Seating Company*, *supra*, which led to the conclusion that the persons involved in those cases did not have the apparent, ostensible or actual authority to bind the company to a collective agreement (again, although the latter case also dealt with the issue of ratification apart from apparent or actual authority).

26. Respondent counsel also argued that the working agreement was a nullity because, it was asserted, Evans would have signed the agreement under duress. The Board did hear some evidence of the practices of the Building Trades Council in that era and has reviewed the minutes of various Council meetings filed with the Board. There is no doubt that there were instances in that period of what could be termed "recognition picketing". However, the evidence falls far short of establishing that the practice was so wide spread and consistently used that it must be *assumed* that Evans, in this instance, signed a working agreement under duress. Moreover, in the specific circumstances of the instant grievance, there is no compelling evidence to warrant such a finding. Greeley could not specifically recall the arguments used to convince Evans to sign but gave a number of arguments "generally used" in such circumstances, only one of which *might* be construed as threatening recognition picketing. More critically, Evans himself did not recall why he signed the working agreement except "to get (union) men". In the Board's opinion, it would have been more probable than not for Evans to have recollected the circumstances if he had actually felt threatened or pressured by the prospect of a picket line into signing the working agreement. There was no evidence whatsoever of a picket line having been established at the University of Toronto job site. The Board is not herein condoning recognition picketing; the Board caselaw has proscribed such conduct (see, for example, *United Brotherhood of Carpenters and Joiners of America*, *supra*, and the cases cited therein). It is simply that the facts in the instant case do not warrant a finding that the working agreement was signed under duress. Thus, the Board finds that the working agreement is not nullified or without force and effect on this ground as well.

REACH OF THE WORKING AGREEMENT

27. Respondent counsel asserted that, because Ellis-Don had no employees at the date the working agreement was signed, the agreement itself was not valid. In so arguing, counsel relied on the line of cases beginning with *Sunrise Paving*, *supra*, through *C. Strauss (1973) Limited*, *supra*, to *Gerald Davidson*, *supra*, *F.D.V. Construction*, *supra*, and *Eighty-Five Electric*, *supra*. The common thread in those cases is that a voluntary recognition agreement signed at a point when no employees have been hired constitutes unlawful employer support for the trade union contrary to section 48 of the Act; the employees subsequently hired would have been deprived of the opportunity to choose their bargaining agent.

28. The Board does not accept respondent counsel's analysis for several reasons. On a general level, the Board has serious concerns as to whether a party can raise its own wrong-doing to defeat a contract to which it is bound: *Whitney Maintenance Limited*, *supra*; *Re Canada Labour Relations Board and Transair Limited*, *supra*. The individuals on whose behalf the respondent asserts the working agreement should be struck down are not before this Board.

29. More specifically, the reasoning in *Sunrise Paving, supra*, and *C. Strauss, supra*, has been excluded in its applicability to circumstances where the seminal document may properly be characterized as “pre-hire” agreement: *Nicholls-Radtke, supra*. It is useful to set out the following somewhat lengthy excerpt from *Eighty-Five Electric, supra*, which reviews the *Nicholls-Radtke* reasoning:

25. Further, beginning with *Nicholls-Radtke, supra*, the Board recognized that in order to accommodate the scheduling and the working realities of the construction industry, the union’s hiring hall function had to be acknowledged and appreciated to be able to operate in such a way as to cause no offence to the protections inherent in section 48 of the Act. In the *Nicholls-Radtke case, supra*, the company entered into an agreement incorporating a collective agreement between the General Contractors of the Construction Association and the union. At the time the agreement was signed, the company had no employees. The agreement was signed on the understanding that the local union would supply workers when they were required. The hiring began within four days. The agreement showed on its face the intention to hire employees in the future. In that decision, the Board reviewed its previous case law that focused on the concern over employer support when agreements were signed before employees were in place. But in the *Nicholls-Radtke case, supra*, the Board concluded the document was signed in contemplation of members being employed on that project. Thus, the Board held that the union was simply acting in its capacity as a trade union in the construction industry trying to obtain work for its members rather than the employer trying to recruit members for the union. This was said to cause no offence to section 48 of the Act. Further, the Board was convinced that the employer needed someone to perform the work and that the union simply undertook to refer its members in exchange for voluntary recognition from the employer as the exclusive bargaining agent for those persons. This was said not to be equal to union support. The full analysis of the case bears repeating.

9. In view of the arguments put forward by the applicant and the intervener, the present case comes down to a very basic policy choice for this Board. Should the Board continue to follow the policy set out in the *C. Strauss* case, that the mere signing of a collective agreement, when there are no employees in the bargaining unit, of itself constitutes employer support for a trade union? The agreed Statement of Facts signed by the parties in this matter indicates in paragraph three that the agreement was signed on the understanding that Local 2693 would supply workers if and when requested to do so by the respondent to the project which would be commenced at a later date. In making such an agreement, the intervener was merely acting as a lot of construction trade unions do in attempting to obtain work for its members. In this regard, reference should be had to section 46 of the Act which deals with certain permitted provisions of collective agreements, in particular union security provisions.

Subsection 1 of section 46 reads as follows:

46. (1) Notwithstanding anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in it provisions,

- (a) *for requiring as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;*
- (b) *for permitting an employee who represents the trade union that is a party to or is bound by the agreement to attend to the business of the trade union during working hours without deduction of the time so occupied in the computation of the time worked for the employer and without deduction of wages in respect of the time so occupied;*

- (c) for permitting the trade union that is a party to or is bound by the agreement to use the employer's premises for the purposes of the trade union without payment therefor.

[original emphasis]

Subsection 4 reads as follows:

(4) A trade union and the employer of the employees concerned shall not enter into a collective agreement that includes provisions *requiring, as a condition of employment, membership in the trade union* that is a part to or is bound by the agreement unless the trade union has established at the time it entered into the agreement that not less than 55 per cent of the employees in the bargaining unit were members of the trade union, but this subsection does not apply.

- (a) where the trade union has been certified as the bargaining agent of the employees of the employer in the bargaining unit; or
- (b) where the trade union has been a party to or bound by a collective agreement with the employer for at least one year; or
- (c) where the employer becomes a member of an employers' organization that has entered into a collective agreement with the trade union or council of trade unions containing such a provision and agrees with the trade union or council of trade unions to be bound by such agreement, or
- (d) where the employer and his employees in the bargaining unit are engaged in the construction, alteration, decoration, repair or demolition of a building, structure, road, sewer, water or gas main, pipe line, tunnel, bridge, canal, or other work at the site thereof.

[original emphasis]

It is of course obvious that section 46(4)(d) uses the exact same language as clause 1(1)(f), the definition of construction industry in the Act. Taken together, subsection 1 and subsection 4 of section 46 can be said to contemplate as permissive, provisions in a construction industry collective agreement requiring as a condition of employment membership in the trade union. And further, the structure of subsection 4 seems to indicate that, in the construction industry, compulsory membership or a preferential hiring clause may be inserted into a first collective agreement signed when voluntary recognition creates the bargaining rights which the union holds. If the Act contemplates as permissive conditions in construction collective agreements, preference of employment for union members extending to membership in a trade union as a pre-condition of employment, are we to find that the signing of such an agreement in the absence of any other factor is to be interpreted as support for the trade union within the meaning of section 48(a)? In the *Sunrise Paving* case [72 CLLC ¶16,060], for instance, there was evidence upon which such a conclusion could be drawn. That is, the employer on hiring employees did the membership recruiting for the union. However, in the *C. Strauss* case, and in the present case, no such implication arises.

• • •

11. In the *Sunrise Paving* case, the Board commented that "the employees of the respondent did not have an opportunity to select their bargaining agent". While in a case where the employer recruits employees who are subsequently forced to join the union, without a previous history of membership that may constitute support for the trade union. The simple fact is that in the construction industry, the unemployed members in a union's hiring hall have in fact selected their bargaining agent as their union, and once they are referred to a job, that selection normally continues. As a consequence, one is faced with a rather difficult problem in interpreting how far the

stated policy of the Board in the *C. Strauss* case should be carried. If an agreement is invalid because it was signed when there were no members in the bargaining unit, does the agreement become valid when, in the same circumstances it is signed after the employees have arrived at the job site. Thus, in the present case, would it really have made any difference concerning the wishes of employees if instead of signing the agreement on October 8, 1975, with an intention to supply at a later date, an agreement to supply had been made between the respondent and the intervener on the 16th of October, when there were two members of the intervener union employed in the bargaining unit? To say that the document is valid then, but not valid if signed on the 8th, in completely similar circumstances, is to propose a distinction without a difference.

12. On the other hand, it may be argued that the *C. Strauss* case, simply recognizes a limitation on the acquisition of bargaining rights that is implicit in the Act, namely, there must be employees in the employ of the employer at the time bargaining rights are acquired. Obviously, this is so in the case of certification, but also in the case of voluntary recognition. In this regard the latent policy in the *Labour Relations Act* is implicit in section 121 of the Act which reads as follows:

“An agreement in writing between an employer or employers’ organization, on the one hand, and a trade union that has been certified as bargaining agent for a unit of employees of the employer, or a trade union or a council of trade unions that is entitled to require the employer or the employer’s organization to bargain with it for the renewal, with or without modifications, of the agreement then in operation or for the making of a new agreement, on the other hand, shall be deemed to be a collective agreement notwithstanding that there were no employees in the bargaining unit or units affected at the time the agreement was entered into.”

That provision primarily recognizes that special circumstances are required for the construction industry due to the cyclical nature of employment in the construction industry. There may be times when an employer has no employees, but never the less as a matter of the on-going labour relations in the construction industry, the employer is bound by the results of collective bargaining. It would appear that such a provision which deems a collective agreement to be valid when there are no employees in the bargaining unit would only be necessary if in fact there was a problem with the validity of collective agreements signed when there are no employees in the bargaining unit.

13. It is our view, however, that when the document in the present case was signed on October 8th, 1975, the respondent and the intervener were performing two distinct, but related acts at the same time. The respondent employer was voluntarily recognizing the intervener union as the exclusive bargaining agent for employees in the bargaining unit, and contemporaneously agreed to certain terms and conditions of employment for those employees who would be affected by the recognition agreement. There would have been no arguable issue in this case as to the validity of the collective agreement if the respondent employer had signed it *after* the union’s members had reported for work. For this Board to hold that, in the circumstances of this case, where no other persons were working or had worked for the employer in the bargaining unit, *and* no other trade union held bargaining rights in respect of that bargaining unit, the agreement is not a valid collective agreement would have us place a premium on a strict, and technical interpretation of the Act, rather than giving the statute a practical and purposive one, particularly having regard to the common and sensible methods used by employers and trade unions in the construction industry to create bargaining rights without resorting to the certification procedures under the Act.

14. The respondent employer required persons to do work for it, and went to the intervener union, who had members available to do that work, for those persons. In the same way that the Courts in the *Blouin Dryall* [(1975) 57 D.L.R. (3d) 199] and *Maritime Employers’ Association* [(1978), 89 D.L.R. (3d) 289] cases, held that members of a trade union who are not actually working for a particular employer but are associated with the union’s hiring hall to seek work are employees, the members of the intervener trade union on whose behalf the collective agreement was entered into are “employees” whom the union represents. Section 121 of the Act indicates that an agreement in writing which is signed when there are no employees in the bargaining unit is deemed to be a collective agreement if, for example, the union is renewing a collective agreement or making a new agreement after an earlier collective agreement had

expired, thus implying that an agreement signed after voluntary recognition when there are no employees in the unit may not be a collective agreement. The Board notes that section 121 of the Act merely deems an agreement in writing to be a collective agreement under certain circumstances; it does not provide that an agreement signed when there are no employees in the unit is not a collective agreement. (See section 48 of the Act for a specific provision deeming an agreement not to be a collective agreement.) Therefore, section 121 of the Act has no application to the facts of this case.

15. The Board in *C. Strauss and Voland* [OLRB File No. 0802-75-R, decision dated 17th November, 1975] held that there was no collective agreement by applying section 49 [now 48] after finding that the union had received "other support" from the employer when it signed a collective agreement without employees in the bargaining unit. We are satisfied that, in the circumstances of this case, although the agreement was signed on October 8th, 1975, when, as the parties have stipulated, "The respondent had no employees in the purported bargaining unit...", the intervener union did not receive "other support" from the employer. To the contrary, the employer needed persons to perform work, and the union, which had members available with the skills necessary to do that work, undertook to refer its members to the employer in exchange for receiving voluntary recognition from the employer as exclusive bargaining agent for those persons. In our view this arrangement in the circumstances presently before us is not "other support" from an employer which calls for the application of section 48 of the Act.

26. The cases since *Nicholls-Radtke*, *supra*, have understandably been based on similar facts. In the *M. J. Guthrie Construction* case, *supra*, the company already had employees and, like the facts in *Nicholls-Radtke*, *supra*, signed an agreement in contemplation of future work. As able and thorough as counsel for the union was in his presentation, he did not present the Board with a case where the Board had recognized a collective agreement between an employer and a trade union in the construction industry where there were no employees at the time of signing and only a hopeful anticipation of the need and ability to hire employees on future projects.

30. In *Eighty-Five Electric*, *supra*, the Board held that the reasoning in *Nicholls-Radtke* was not applicable as there was no immediate or realistic expectation there would be employees hired in the near future. In *F.D.V. Construction*, *supra*, there was no evidence of the actual supply of members nor of the ability of the union relying of a purported voluntary recognition agreement to supply workers pursuant to that agreement. In the circumstances, the Board found that the employer had given support within the meaning of section 48 of the Act to that union.

31. In the instant case, there is no doubt workers were hired on the University of Toronto project both directly by Ellis-Don and through subcontracts. Indeed, Evans testified that he would have signed the working agreement "to get men". In the circumstances and for reasons given in more detail in paragraph 32, the Board finds that the reasoning in *Nicholls-Radtke* is applicable and the working agreement was valid at the time signed. In passing, the Board notes that the circumstances in *Gerald Davidson*, *supra*, are so dissimilar to those in the instant proceeding that the reasoning therein is not applicable.

32. Counsel for the respondent also construed his "pre-hire" argument more narrowly. That is, it was asserted that the working agreement could, at the very least, not properly be depicted as a genuine pre-hire agreement with respect to electricians since Ellis-Don did not at the time nor in fact thereafter directly hire electricians. Rather, electrical work was consistently subcontracted. In the Board's opinion, where the seminal document is a working agreement of the form in the instant case, entered into by the Building Trades Council on behalf of all its affiliates, the reach of that working agreement is not restricted to only those affiliates who could represent workers who are subsequently direct hires of the respondent. If the working agreement as a whole reasonably may be characterized as a pre-hire agreement so as to come within the *Nicholls-Radtke* analysis, the fact that some affiliates would rely on the subcontracting provisions of the working agreement as the form in which their bargaining rights are actually expressed does not invalidate the working agreement or disentitle them to those bargaining rights. In *Nicholls-Radtke*, the Board

concluded that the special characteristics of the construction industry alleviated the concerns expressed in the jurisprudence that voluntary recognition of a trade union where there were as yet no employees constituted unlawful support for that trade union. Employment opportunities in the construction industry are channelled through the hiring hall. The working agreement, on the one hand, represents voluntary recognition by the employer of the trade union as bargaining agent and, on the other hand, obligates the union to refer its members who possess the skills needed by the employer to perform work. In the instant case, Ellis Don in executing the working agreement, assured itself of a supply of skilled workers. In return, Ellis-Don voluntarily recognized *all* the affiliates of the Building Trades Council and bound itself to subcontract only to subcontractors whose employees were members in good standing of affiliates of the Building Trades Council. Whether or not, at the time of executing the working agreement, it was open to Ellis-Don to seek to pick and choose which affiliates were being accorded voluntary recognition, that was not the basis on which the document was offered and signed. In the circumstances, the nature of that working agreement does not raise concerns about employer support so as to invalidate the document.

33. Thus, the Board is not prepared to conclude, as respondent counsel urges, that the working agreement constitutes employer support in respect of the IBEW Local 353, an affiliate of the Council at the time the working agreement was entered into, on the basis that Ellis-Don did not contemplate hiring electricians directly. In this regard, the Board notes that the fact that Local 353, IBEW was an affiliate at the time distinguishes the instant grievance referral from that in *Eastern Construction, supra*. [The Board will deal further with the extension of bargaining rights held by Local 353 to Local 894 *infra*.]

34. The Board is also not persuaded by respondent counsel's argument that the IBEW locals should not be able to rely on the voluntary recognition of their bargaining rights through the working agreement where the certification route to acquire bargaining rights did not exist (since Ellis-Don has never hired directly electricians). That is, counsel contends that voluntary recognition as a route to acquire bargaining rights must be parallel to and delimited by the certification route to achieve those rights. The Board does not agree. In one sense, voluntary recognition may be depicted as an alternate route to certification. However, the statute treats both routes to the acquisition of bargaining rights in quite different ways. For example, bargaining rights acquired through voluntary recognition may be challenged and defeated on grounds and in time periods not paralleled where the bargaining agent has been certified. Further, there Board has previously found that a bargaining unit description agreed to by the parties in the context of a voluntary recognition agreement may properly differ significantly from that for which the Board would have certified a bargaining agent and such variance does not, of itself, constitute employer support: *J.C. Milne, supra*.

35. Respondent counsel, as well, challenged the Board's reasoning in *Harbridge & Cross, supra*, and urged the Board to revisit the finding in that case that the working agreement was not restricted to the six civil trades. In the circumstances, it is appropriate to quote extensively from the reasoning in that decision:

19. This is not the first occasion the Board has had to grapple with a working agreement of the type between the Toronto B.T.C. and this respondent. In previous decisions, the Board has concluded that a working agreement can give rise to bargaining rights. We accept Mr. Binning's position that this application must be decided on its own facts and the arguments made before us. However, it is useful to review briefly the way in which the Board has previously analyzed and characterized the type of working agreement we have before us.

20. In *M. J. Guthrie Construction Limited*, [1984] OLRB Rep. Jan. 50, the Board analyzed at

some length a working agreement which had terms virtually identical to those contained in the Working Agreement relied upon by the applicant. In paragraph 13, the Board notes that:

13. ...Working agreements have become very much a part of the unionized portion of the construction industry in the Toronto area and have been regarded as peace treaties and instruments for harmony in the construction industry. However, regardless of these characterizations, the working agreement has traditionally been used, as in the instant case, as an entry into unionized construction work and as a method for an employer to stay on side from the point of view of the craft trade unions in the construction industry. ...

21. In paragraph 16 of *Guthrie, supra*, the Board summarizes the substance of the working agreement before it. This summary, which is set out below, has equal application to the Working Agreement between the Toronto B.T.C. and Harbridge & Cross Limited.

16. The working agreement is a brief document which names the parties and states its purpose as the establishment of mutually satisfactory relations between Guthrie and its employees and satisfactory working conditions, hours of work and wages. In the recognition portion, Guthrie recognizes the Council and its affiliated unions as the collective bargaining agency for all of its employees. Guthrie has also agreed to employ only members affiliated with the Council and to subcontract only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council and to do all things necessary to ensure that only members of the unions affiliated with the Council are employed in construction work in which Guthrie is engaged. The Council has agreed through its affiliated unions to supply competent workmen to do the work of any trade or calling that may be required by Guthrie in the trades represented by the Council. Guthrie has also agreed to recognize and be bound by the agreements existing between each of the unions affiliated with the Council and the Toronto Builders' Exchange and has specifically agreed that the provisions relating to wages, hours and working conditions set forth in these agreements are binding on it. Guthrie has also agreed to be bound by any alterations and amendments to these agreements and the Council has agreed to notify Guthrie of such alterations or amendments. Finally, the working agreement is said to remain in effect for one year and to continue in effect from year to year subject to notice.

22. The Board in *Guthrie, supra*, proceeded to determine that the Toronto-Central B.T.C. is not a trade union but rather a council of unions. As such, the Toronto-Central B.T.C. could not enter into either a collective agreement or a voluntary recognition agreement in its own name. Each of the affiliates of the Toronto-Central B.T.C. are trade unions which are able to enter into collective agreements and voluntary recognition agreements. The Board concluded that, through the working agreement, the Council entered into a series of recognition agreements on behalf of each of its affiliates with Guthrie.

23. We now turn to the instant application. In essence, the issue before us is whether the Painters acquired bargaining rights by means of the Working Agreement signed between the Toronto B.T.C. and Harbridge & Cross Limited. Harbridge & Cross Limited did not take the position that the Working Agreement was not lawfully executed or that the Painters had abandoned its bargaining rights, if it had any. The parties have agreed that Harbridge & Cross Limited duly entered into the Working Agreement with the Toronto B.T.C., that the Toronto-Central B.T.C. stands in the same relation to the respondent as did the Toronto B.T.C. prior to July 1, 1979, and that, at all times material, District Council 46, an affiliate of the applicant, was an affiliate of the Toronto B.T.C. and since July 1, 1979 of the Toronto-Central Ontario B.T.C. It is not disputed that if the applicant has bargaining rights with the respondent then by virtue of the province-wide bargaining provisions of the Act enacted in 1977, Harbridge & Cross Limited would be bound by the Painters' Provincial Agreement in the industrial, commercial and institutional sector of the construction industry. The parties have agreed that Harbridge & Cross Limited sublet painting work covered by the Painters' Provincial Agreement to painting subcontractors who are not bound by the Painters' Provincial Agreement.

24. In determining the issue of whether the Working Agreement creates bargaining rights for

the Painters, the Board has relied only on the facts as agreed to in the agreed statement of facts, the exhibits which were all entered on consent and the parties' submissions.

25. The Working Agreement between the applicant and respondent contains a very broad recognition clause. In paragraph 2 of the Working Agreement, Harbridge & Cross Limited agreed to recognize the Toronto B.T.C. and its affiliated unions as the collective bargaining agency for all its employees. The specific words used in paragraph 2 do not contain any indication that the parties to the Working Agreement intended Harbridge & Cross Limited to recognize a limited number of affiliates rather than all of the Council's affiliates as collective bargaining agents for its employees. Reference is also made to the affiliated unions in paragraph 3 and 4 of the Working Agreement and these references, as well, contain no indication that there was an intention to apply these paragraphs to some affiliates but not to others.

26. Paragraph 5 of the Working Agreement provides that Harbridge & Cross Limited agrees to recognize and be bound by the agreements existing between each of the unions affiliated with the Toronto B.T.C. and the T.C.A. It is clear from paragraph 5 of the Working Agreement that the term agreements refers to collective agreements. On the facts before us, paragraph 5 would bind Harbridge & Cross Limited to only the civil trade agreements with the T.C.A. Every collective agreement is deemed by the Act to provide for a recognition clause. If the parties to the Working Agreement intended the Working Agreement to create bargaining rights for only those affiliates who had collective agreements with the T.C.A., then paragraph 2 of the Working Agreement would be unnecessary. The parties to the Working Agreement could have easily created this result by only including paragraph 5 in the Working Agreement. The presence of paragraph 2 of the Working Agreement indicates that the parties did not intend to limit bargaining rights to only those affiliates who had a collective agreement with the T.C.A. This view is supported further by paragraph 4 of the Working Agreement which provides that the affiliated unions will supply competent workmen to do the work of any trade or calling that may be required by the respondent in the trades represented by the Toronto B.T.C. This obligation on the affiliates is not limited to the six civil trades.

27. Both counsel made submissions with respect to which rule of interpretation should be adopted when attempting to interpret the provisions of the Working Agreement. When attempting to interpret an agreement, a general guide to interpretation is to presume that all the words were intended to have some meaning. In utilizing this guide, the Board is satisfied that meaning can be given to both paragraphs 2 and 5 of the Working Agreement and that these paragraphs do not conflict. When reviewing the document as a whole, the Board is satisfied that the parties to the Working Agreement intended that Harbridge & Cross Limited recognize the Council and each of its affiliated unions as collective bargaining agents for its employees. Paragraph 5 addresses what collective agreements Harbridge & Cross Limited will be bound to. Paragraph 2, which creates bargaining rights for all affiliates with the respondent does not conflict with paragraph 5 which simply addresses the question of what collective agreements Harbridge & Cross Limited will be bound by. An examination of the headings used in the Working Agreement further support the proposition that paragraph 2 and paragraph 5 address separate matters. Paragraph 2 is under the heading "RECOGNITION" while paragraph 5 is under the heading "WAGES, HOURS AND WORKING CONDITIONS".

28. The Board does not accept counsel for the respondent's first argument with respect to how the Working Agreement should be interpreted. The Board is satisfied that the provisions of the Working Agreement do not disclose that the parties intended to create bargaining rights for only the six civil trades. In addition to the comments above, the Board notes that it is significant that the Working Agreement is an agreement between the Toronto B.T.C. and Harbridge & Cross Limited. Not only does paragraph 2 refer to the Toronto B.T.C.'s affiliates but one would assume that when the Toronto B.T.C. acted it would do so on behalf of all its affiliates unless there is something in the document which would suggest otherwise. Neither paragraph 5 of the Working Agreement nor any other clause in the Working Agreement suggest otherwise.

29. The other position advanced by counsel for the respondent is that the Working Agreement does not create bargaining rights for the Painters or the other affiliates except the six civil trades, since it does not contain a defined bargaining unit. He argues that the incorporation of the recognition clauses in the collective agreements between the six civil trades and the T.C.A. satisfies the requirement for a defined bargaining unit and, therefore, gives validity to the

Working Agreement as a voluntary recognition agreement for only the six civil trades. In the Board's view, the Working Agreement does define the parameters of the bargaining rights to the degree necessary to satisfy the requirement of a defined bargaining unit. The Board agrees with *Guthrie, supra*, in its characterization of the working agreement. By means of one document, the Toronto B.T.C. entered into a series of recognition agreements between all of its affiliates, including the Painters and Harbridge & Cross Limited. The Toronto B.T.C.'s affiliates are trade unions which are representative of certain well-defined trades in the construction industry. Paragraph 2 of the Working Agreement provides, in effect, that Harbridge & Cross Limited recognizes the Toronto B.T.C. and its affiliated unions as the bargaining agent for all of its employees. The term employees can only refer to those employees of the respondent engaged in construction work who would normally perform work performed by members of the Toronto B.T.C.'s affiliates. Paragraph 3 of the Working Agreement makes reference to the phrase "employ only members of the unions affiliated with the Council". As noted earlier, paragraph 4 of the Working Agreement obliges each affiliated union to "supply competent workmen to do the work of any trade or calling that may be required by Company in the trades represented by the Council". In other words, the Plumbers union is required to supply its members to the respondent, and the Carpenters union is required to supply its members, etcetera. When one reviews the Working Agreement as a whole, and particularly paragraphs 2, 3 and 4 contained therein, the Board is satisfied that the Working Agreement does contain, in effect, defined bargaining units and constitutes a voluntary recognition agreement under the *Labour Relations Act*. The Working Agreement contains a defined bargaining unit even in the absence of the incorporation of a collective agreement by the operation of paragraph 5 of the Working Agreement.

30. In support of his second argument, counsel for the respondent referred to certain comments of the Board in *Guthrie, supra*, and *V. K. Mason Construction Ltd., supra*. We have reviewed these decisions and were not persuaded that they should lead us to a conclusion different from the one expressed in the previous paragraph of this decision. In *Guthrie, supra*, the Board did not have to address whether the Working Agreement contained a defined bargaining unit in the absence of the incorporation of certain collective agreements, since there existed, it appears, collective agreements which would be incorporated by paragraph 5. This precise issue does not appear to have been argued in *Guthrie, supra*. The working agreement before the Board in the *V. K. Mason case supra*, is not set out in its entirety in the decision. From those portions which are set out, it appears that the working agreement is significantly different from the Working Agreement before us.

36. The working agreement in the instant grievance referral is in all material respects identical to that before the Board in *Harbridge & Cross*. The Board is not persuaded by the able arguments of counsel that the Board's analysis in *Harbridge & Cross* is flawed; the Board affirms the reasoning therein. The Board finds that reasoning persuasive in the instant case and warrants a conclusion here that the working agreement entered into in 1962 by Ellis-Don constituted a series of voluntary recognition agreements between Ellis-Don and the affiliates of the Building Trades Council. It was not seriously disputed that Local 353, IBEW was at the time and thereafter an affiliate of the Council nor that Local 894 later became affiliated with the Council on the latter's expansion of its jurisdiction to include Central Ontario. Respondent counsel pointed to the absence of Ellis-Don from schedules E or F of the accreditation order issued for the Electrical Contractors Association as a distinguishing feature of the instant case from *Harbridge & Cross*. In the Board's opinion, that distinction goes to the abandonment issue not to the question of the reach of the working agreement. The express wording of the working agreement is unrestricted. The evidence pointed to by respondent's counsel (even including the absence of Ellis-Don from schedule F in the accreditation order) is not a compelling basis for delimiting those express words in the recognition clauses. Article five of the working agreement does refer to extant collective agreements. In the Board's view, this reference merely clarifies that the employer signing the working agreement recognizes voluntarily the various Council affiliates *and*, with respect to those collective agreements negotiated by the Toronto Builders' Exchange, is expressly bound to those documents. As well, the fact that there were two subsequent certification applications as against Ellis-Don by other Council affiliates (see paragraph 48) does not convince the Board that in *Harbridge & Cross*, or at

least herein, the working agreement should be found to have been intended to apply only to the six civil trades which traditionally have had collective agreements with the Toronto Construction Association or its predecessor the Toronto Builders' Exchange. Given that the working agreement is a series of voluntary recognition agreements, the actions of other affiliates do not bind Local 353 IBEW nor do those certification applications nullify the express words of the working agreement as covering all affiliates.

37. It is accurate to note that in some of the cases wherein the working agreement or like document was considered, the evidence indicated that the companies therein had initially sought the benefit of entering into such an agreement or had complied with its terms for some period but then sought to repudiate that agreement. In those circumstances, the Board refused to allow such a repudiation: *City Plumbing (Kitchener) Limited, supra*; *M. J. Guthrie*, [1984] OLRB Rep. Jan. 50. Although the evidence is somewhat sketchy in the present grievance referral, the Board is satisfied that Evans, on behalf of Ellis-Don, entered into the working agreement in 1962 to get the benefit of that agreement in respect of the University of Toronto project and cannot now repudiate that document. To be sure, Ellis-Don at the time did not contemplate hiring electricians directly and has not done so subsequently. However, the Board does not consider it necessary to find that the benefits sought related to hiring directly workers from each affiliate covered by the working agreement. It is sufficient if the company seeks the benefit of the voluntary recognition relationship taken as a whole and, as in the instant case, had the actual benefit of that working agreement on the University of Toronto project.

38. The Board intends to deal rather briefly with respondent counsel's argument that the various amendments introducing and refining the province-wide bargaining scheme did not intend to validate and broaden the reach of voluntary recognition agreements like the working agreement now before the Board. In the Board's view, that argument cannot succeed. The Board has already referred to the decision in *M. J. Guthrie, supra*, wherein the Board found that the Toronto-Central Ontario Building Trades Council was a council of trade unions (but not a certified council of trade unions) and thus could not enter into a collective agreement or voluntary recognition agreement in its own name but merely on behalf of each of its affiliates. As stated in the *United Brotherhood of Carpenters, supra*:

13. A reading of the provisions of the Act establishing provincial bargaining indicates that the Legislature intended the foundation of provincial bargaining to be pre-existing local bargaining rights. Section 127(1)(b) clearly provides that the employer bargaining agency is to represent only those employers "for whose employees affiliated bargaining agents hold bargaining rights". The bargaining obligation of these employers then vest in the employer bargaining agency by operation of section 131. On the union side, the bargaining rights of the affiliated bargaining agents, by operation of section 130, vest in the employee bargaining agency designated under section 127(1)(a) of the Act. The legal result is simply a consolidation in the bargaining agencies of those bargaining rights and obligations existing at the time of designation. No existing bargaining rights are lost and no new bargaining rights are created.

39. Subsequent amendments resulted in the deeming of a voluntary recognition agreement between an affiliated bargaining agency and an employer to be on behalf of all the affiliated bargaining agents of the employee bargaining agency. It was not disputed that Locals 353 and 894 are affiliated bargaining agents of the designated employee bargaining agency. Thus, the legislation initially preserved the status quo with respect to bargaining rights, i.e., the bargaining rights which the Council acquired on behalf of Local 353. Subsequently, the bargaining rights were deemed to be between the employer and Local 894 as well. To accede to respondent counsel's argument would result in the loss of the bargaining rights acquired by the Council affiliates simply because those rights were acquired in the form of a voluntary recognition agreement (or more precisely a

series of voluntary recognition agreements) between Ellis-Don and the Council on behalf of its affiliated members. The Board does not regard that result as that intended by the Legislature; rather, the statutory scheme intended to opposite result, as stated in the *Carpenters* case above.

40. The Board, for the reasons given, rejects the various arguments of respondent counsel regarding the reach of the working agreement and finds that document did bestow

bargaining rights on the IBEW, Local 353.

ABANDONMENT/ESTOPPEL

41. The Board, in this section, deals first with the effect of the withdrawal of the 1980 grievance referral and then the issue of abandonment “pre”-and “post” the introduction of the province-wide bargaining scheme in the ICI sector.

42. The style of cause in the 1980 grievance referral reads:

Toronto-Central Ontario Building and Construction Trades Council, The Teamster Construction Council of Ontario, and The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 230,

(Applicants),

- and -

Ellis Don Limited,

(Respondent).

That application was withdrawn by leave of the Board by decision dated July 5, 1980, because the applicants, as stipulated by the parties herein, could not establish the identity of the signatory on behalf of Ellis-Don. There, as here, the applicants were relying on the 1962 working agreement. Also, as noted, Michaels conceded that, had the Council exercised due diligence in searching its records, the identity of Evans as signatory would have been discovered much earlier so that, at the very least, the instant application could have been filed well before January 19, 1990. Counsel for the respondent asserted these circumstances should lead to the dismissal of the grievance based on estoppel. Counsel also tied the withdrawal of the 1980 grievance to his submissions on abandonment broadly construed. The earlier grievance referral was brought in the name of the Toronto-Central Ontario Building and Construction Trades Council, the Teamsters Construction Council of Ontario and the Teamsters Local 230. The applicant in the instant case is Local 894, IBEW. There is no doubt that the Building Trades Council is keenly interested in the outcome of the present proceeding. However, that interest (and the presence of the Council’s business manager/financial secretary as advisor to the applicant’s counsel) is not sufficient to render identical the parties to the 1980 grievance and the instant proceedings so that the IBEW Local 894 is estopped on that ground alone from bringing this grievance. The withdrawal of the 1980 grievance, particularly on the grounds stated, does not amount to a representation to Ellis-Don that the 1962 working agreement would never again be relied on by any other of the Council’s affiliates (or even by the Teamsters Council and its Local 230) to ground a section 124 referral. Thus, the conditions precedent to a finding of estoppel are not made out (in contrast to the circumstances in *Ontario Hydro*, *supra*). The Board notes that a similar argument was raised in *Harbridge & Cross*, *supra*, wherein the circumstances were redolent of the instant case. The Board affirms the reasoning therein at paragraphs 8 to 10 inclusive and, as there, rejects the respondent’s argument for dismissal of the grievance referral on this ground. The Board does not doubt its authority to apply equitable concepts akin to *res judicata* or issue estoppel, it is merely that the basis for the application of such doctrines

are not here present: see also *Napev Construction limited, supra*. The Board would add that the Board's rejection of the respondent's argument in no way condones the delay involved or the absence of due diligence. The passage of time and that absence may properly be considered in assessing the retrospective nature of damages or other relief. Indeed, as counsel for the applicant stressed, no relief is sought for the period prior to the Trent project and the grievance herein did follow notice through correspondence from Michaels to Ellis-Don that the identity of the Ellis-Don signatory had been discovered and the 1962 working agreement was being relied on as a source of bargaining rights.

43. The concept of abandonment of bargaining rights is not novel in Board jurisprudence, as the following excerpt from a 1979 Board decision in *J. S. Mechanical, supra*, makes clear:

4. Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act (see *Cooksville Sheet Metal*, [1974] OLRB Rep. June 365; *John Entwistle Construction Limited*, [1972] OLRB Rep. Oct 919; *Elgin Construction Co. Limited*, [1969] OLRB Rep. April 134; *Guelph Cartage Company*, 55 CLLC para. 18,018). As well, if a union has abandoned its bargaining rights it may be precluded from relying on them either to bar another agreement that renews itself automatically (see *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *O. & W. Electronics Limited*, [1970] OLRB Rep. Jan. 1213; *Architectural Acoustics & Drywall*, [1970] OLRB Rep. Feb. 1408; *N. W. Clayton Sheetmetal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69), or to require an employer to bargain by giving notice to bargain under such an agreement (see *Rainee Manufacturing Products Limited*, [1967] OLRB Rep. Nov. 796). A union's abandonment might also obviate the necessity for the Board to determine the merits of a termination application (see *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379; *Northern Engineers & Supply Co. Limited*, [1968] OLRB Rep. Oct. 731; *Barrie Tanning Limited*, [1966] OLRB Rep. May 128).

Prior to the introduction of province-wide bargaining in the ICI sector, the Board has on several occasions determined, as a matter of fact, that a trade union has abandoned its bargaining rights through inaction. (The question of abandonment subsequent to the introduction of the legislative scheme for province-wide bargaining is dealt with further below). A useful summary of the caselaw and the factors influencing the Board's assessment is found in *R. Reusse Co. Ltd., supra*:

13. It was not disputed that the question of abandonment is a matter of fact to be resolved by the Board in the circumstances of each case: *J. S. Mechanical, supra*; *Inducon Construction (Northern) Inc., supra*; *John Entwistle Construction Limited, supra*; *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) et al, Re Labourers' International Union of North America, Local 527 et al. and John Entwistle Construction Ltd. et. al., supra*; *Twin City Plumbing and Heating*, [1982] OLRB Rep. Apr. 631. In making that determination, the Board evaluates the conduct of the union in the context of the duration of the period of inactivity, whether the employer continued to operate in the area, whether the terms and conditions of employment have been changed by the employer without objection from the union, whether the union has sought to negotiate or administer existing collective agreements and any extenuating circumstances which might account for an apparent failure to assert bargaining rights. For example, as a general rule, the Board has regard to a second automatic renewal of a collective agreement but thereafter the onus is on the union to satisfy the Board that its bargaining rights have not been abandoned by showing its interest in maintaining those rights through contact with the employer party to the agreement: *The Belleville and District Builders' Exchange, supra*; *Cooksville Steel Limited, supra*; *Pinkerton's of Canada Limited, supra*. Absent evidence the union actively pursued its bargaining rights, the Board has held the union has "slept on those rights" and must be taken to have abandoned those rights: *Elgin Construction, supra*; *Mattagami Construction, supra*; *Catalytic Enterprises, supra*; *John Entwistle Construction*

Limited, supra; York Finch General Hospital, supra. The Board's jurisprudence also accepts the notion that a union is not expected to seek actively to pursue its bargaining rights during periods when the employer ceased operating within the geographic scope of the collective agreement (see *Able Construction (Kitchener), supra; Inducon Construction (Northern) Inc., supra*) particularly where the union did seek to assert those rights at the first opportunity upon the employee's return to the area: *John Miller & Sons Ltd., supra.*

A finding of abandonment prior to the introduction of province-wide bargaining precludes a trade union from "plugging into" that province-wide bargaining scheme with respect to the particular employer so that provincial agreements are not binding on the employer in question: *John Entwistle, supra, Hugh Murray Limited, supra.*

44. It is in the above jurisprudential context that the Board must analyse the evidence in the instant case. The working agreement was executed in December 1962. That agreement on its face provides for automatic renewals unless notice of termination is given in any year not less than 60 days before the date of its termination. There was no evidence of any such termination. What is novel in this case is that Ellis-Don has never employed electricians on a direct hire basis. Electrical work has always been subcontracted. (In contrast, Ellis-Don acknowledges it is and has been bound to successive collective agreements negotiated over the years with the six civil trades. Such negotiations were conducted on Ellis-Don's behalf by the Toronto Builders' Exchange and its successor the General Contractors section of the Toronto Construction Association; Ellis-Don is and was a member of both organizations). The instant grievance, then, is not like those abandonment cases wherein there were employees in the bargaining unit for varying periods of time during which the union did not seek to administer or negotiate collective agreements. Rather, here, the applicant is relying on the subcontracting provisions of the working agreement (paragraph 3 of Exhibit 5) to ensure that Ellis-Don lets "subcontracts only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council", namely, Local 894, IBEW, with respect to the electrical work at the Trent project.

45. The Board must, therefore, examine the "electrical subcontracts" of Ellis-Don in the Toronto area prior to the introduction of province-wide bargaining. In this regard, the Board notes the expansion in 1979 of the Council's jurisdiction whereby Local 894 of the IBEW became affiliated. Local 353, IBEW was affiliated with the Council before the 1962 working agreement was signed and continuously thereafter. In the Board's view, there must be inactivity on the part Local 353 or other conduct indicative of abandonment in the period from 1962 to 1978 when the province-wide bargaining scheme was introduced to sustain a finding of abandonment. The Board is not persuaded by the able arguments of counsel for the respondent that the applicant should be held accountable for inactivity by other Council affiliates (except Local 353 IBEW) in enforcing rights under the working agreement. The Council acted on behalf of its affiliated bargaining agents in obtaining voluntary recognition from those firms signing the working agreement. The Board accepts the evidence that it is the responsibility of the various business agents to police their respective trades to monitor compliance by the employer with the working agreement only for their respective trades. The Board sees no basis in law or practice to hold the IBEW Local 353 (and then 894) accountable for the failure of other trades to enforce the working agreement. As noted earlier, the working agreement constituted a series of recognition agreements with the various affiliates. Local 353 is not bound by the actions or inaction of other affiliates. Of course, Local 894 is bound by the actions or inaction of Local 353 as, if that latter local abandoned its bargaining rights prior to the introduction of province-wide bargaining, Local 894 could not rely on that legislation to acquire bargaining rights.

46. Richer, on behalf of Ellis-Don submitted and explained the various statistics and records of the firm's operations over the years. There is no doubt that Ellis-Don is a major player

amongst general contractors in Ontario and has been so for many years. Its projects are often high profile and readily identifiable. Richer indicated that, because of the absence of company documentation, there were no verifiable non-union subcontracts let in the Toronto area in the 1962 to 1969 period. Further, it appears (and was conceded by respondent counsel) that there were no non-union electrical subcontracts at all in that area even during subsequent years (but prior to 1978). This absence of non-union subcontracts may be regarded as somewhat equivocal. One could infer that this resulted from the lack of non-union electrical subcontractors in Toronto capable of performing the work *or* compliance by Ellis-Don with the working agreement in letting electrical contracts to non-union subcontractors. Weighing against this latter conclusion is the testimony of Burns, which the Board accepts, that he let subcontracts without regard to the “union” or “non-union” status of the subcontractors. However, the absence of overt activity by the Local 353 and the absence of contact with Ellis-Don during those years cannot, of itself, be a hallmark of abandonment where it would appear that Ellis-Don was subletting work only to “union” subcontractors. That is, if the electrical subcontracts were let to union firms, Local 353 would have had no reason to seek to enforce the working agreement. On this point, the following passage from *Newman Bros. Limited, supra*, is apposite:

45. There is, in the argument of the respondents, the concept that contact is necessary in order to maintain bargaining rights. However, where an affiliated bargaining agent or an employee bargaining agent has no reason to believe that a collective agreement is not being adhered to; the scheme of collective bargaining under the Act, whether under a system of accreditation or under province-wide bargaining, is not conducive to the personal contact which was often a *sine qua non* in the jurisprudence of the Board with respect to the principle of abandonment. Indeed, the Board has noted in *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568, 572 that the lack of contact by a bargaining agent in the construction industry where there has been an absence of employees who would be covered by successive collective agreements would not support a finding of the abandonment of bargaining rights. While it may be debated that a bargaining agent might be more active and play a more investigative role in policing its collective agreements, such debates essentially relate to the adequacy or quality of representation rather than to the principle of abandonment. The disapproval of the Board with respect to the quality of representation has not in itself caused the Board to find an abandonment of bargaining rights. In this regard, see *The Borden Company Limited* case, [1976] OLRB Rep. July 379, 382.

While Ellis-Don was subcontracting to “union” electrical contractors, absent other indicia of abandonment, it could not fairly be said that the union “slept on its rights”.

47. The documentary material outlining Ellis-Don’s construction activity does not buttress the respondent’s abandonment argument. The Board noted in the preceding paragraph that the IBEW Locals 353 and 894 should not be held accountable, under the abandonment concept, for the failure of other trades to enforce the working agreement. However, the Board would note here that the evidence of non-union subcontracting by Ellis-Don amounted to such a small percentage over the years prior to 1978 (less than 1 percent) that the evidence would not sustain a finding of abandonment by other trades sufficient to “count against” the applicant even on the broader theory espoused by respondent counsel.

48. In the same vein, the Board does not consider the certification applications in 1975 by the International Association of Bridge, Structural and Ornamental Ironworkers Local 721 and in 1986 by the International Union of Bricklayers and Allied Craftsmen and Local Union 7 Canada for Marble Masons, Tile Layers & Terrazzo Workers as a reasonable basis for finding abandonment by the applicant. There is no evidence before the Board on which the Board may discern the reason those applications were brought. Moreover, it is not reasonable to conclude on the evidence that these two (or other) Council affiliates acted as agent for the applicant herein so that their certification applications could be regarded as “holding out” to the respondent that all other affiliates (or at least the IBEW Locals 894 and 353) were abandoning whatever bargaining rights they pos-

sessed. Whatever the actual reason, the mere fact of those certification applications does not reasonably sustain a conclusion that the applicant in the instant case abandoned its bargaining rights.

49. Parenthetically, it should be noted that Ellis-Don was not taking the position that the letting of non-union subcontracts over the years as described constituted abandonment by any of the six civil trades of their bargaining rights. Yet the evidence of those few “non-union” subcontracts generally covered work usually performed by those six civil trades. Apart from the other reasons noted, the Board is reluctant to rely on that evidence to ground a conclusion that the IBEW Local 353 abandoned its bargaining rights where that evidence, in the respondent’s view, would not sustain a finding of abandonment by the very trades which would usually perform that work.

50. If the foregoing factors do not lead to a finding of abandonment, is there any other conduct by the union which unequivocally does point to that conclusion? In this regard, the Board must consider the “accreditation” issue. Board File No. 1469-71-R was an application for accreditation between the Electrical Contractors’ Association of Toronto (applicant) and the International Brotherhood of Electrical Workers, Local Union 353 (respondent) and the Electrical Power Systems Construction Association (intervener). Before dealing further with that decision, it is useful to sketch the accreditation process itself.

51. That process was briefly summarized in *Metropolitan Sewer and Watermain Contractors, supra*, as follows:

2. Once the Board is satisfied that an application has been duly brought under section 125 of the Act by a properly constituted employers’ organization, vested by the employers whom it represents with the appropriate authority “... to enable it to discharge the responsibilities of an accredited bargaining agent.” [subsection 127(3)], and the Board has determined the unit of employers that is appropriate for collective bargaining pursuant to section 126, the Board acquires jurisdiction under subsection 127(2) to accredit the employers’ organization if the Board is satisfied that the organization has met the double majority test prescribed by that subsection. The double majority is based on a count of employers and employees prescribed by subsection 127(1). The two subsection state as follows:

127.-(1) Upon an application for accreditation, the Board shall ascertain,

- (a) the number of employers in the unit of employers on the date of the making of the application who have within one year prior to such date had employees in their employ for whom the trade union or council of trade unions has bargaining rights in the geographic area and sector determined by the Board to be appropriate;
- (b) the number of employers in clause (a) represented by the employers’ organization on the date of the making of the application; and
- (c) the number of employees of employers in clause (a) on the payroll of each such employer for the weekly payroll period immediately preceding the date of the application or if, in the opinion of the Board, such payroll period is unsatisfactory for any one or more of the employers in clause (a), such other weekly payroll period for any one or more of the said employers as the Board considers advisable.

(2) If the Board is satisfied,

- (a) that the majority of the employees in clause (1)(a) is represented by the employers’ organization and

- (b) that such majority of employers employed a majority of employees in clause (1)(c),

the Board, subject to subsection (3), shall accredit the employers' organization as the bargaining agent of the employers in the unit of employers and for such other employers for whose employees the trade union or council of trade unions may, after the date of the making of the application, obtain bargaining rights through certification or voluntary recognition in the appropriate geographic area and sector.

3. It can be seen from the wording of those subsections that, of all the employers for whose employees the respondent trade unions held the requisite bargaining rights as at the date of making of the application, only those who employed such employees within one year prior to the application date were "counted" for purposes of determining whether the Board was required to accredit the employers' organization. Once the Board acquired that jurisdiction, however, subsection 127(2) required it to accredit the organization as exclusive bargaining agent for all of the employers for whose employees the respondent held the requisite bargaining rights as at the date of making of the application, whether or not those employers employed such employees within one year prior to the date of making of the application. In other words, for the Board to satisfy its mandate under subsection 127(2), it must accredit the employers' organization as bargaining agent of all of the employers who were in the unit of employers as at the date of making of the application.

52. In that case, the Board ultimately determined that it need not and should not conclusively identify those employers for whose employees the respondent trade union had bargaining rights as at the date of the application but who had not employed such employees within one year prior to that date in order to acquire jurisdiction to accredit the applicant and make final disposition of the applications. The earlier Board practice had been to firstly determine a list of such employers, referred to as "schedule F". In contrast, schedule E named those employers who would be included in the count of employees in section 127(1) and the double majority count in section 127(2). The rationale for the change in practice is not relevant to the issue before the Board in the instant case. What is important is that, as part of an accreditation application, the respondent trade union files with the Board a "schedule F" wherein the union lists those employers with whom it asserts it has bargaining rights but who did not have employees within one year prior to the accreditation application date. In reviewing Board File 1469-71-R, wherein an accreditation order was issued on January 9, 1975, it is apparent that Ellis-Don's name does not appear on the final schedule F nor was Ellis-Don's name struck off an initial schedule F as were other employers who challenged their inclusion on schedule F by the respondent trade union. Quite simply, it appears that Local 353 did not include Ellis-Don's name on schedule F which the union filed with the Board. (There can be no dispute that Ellis-Don's name would not have appeared on schedule E as Ellis-Don never hired electricians directly. That is, the respondent union would not list Ellis-Don on schedule E as an employer with whom it asserts the union has bargaining rights and who did have employees within one year of the accreditation application date.)

53. The accreditation process is lengthy and complex. Certainly under the Board practice in force in January 1975, the process involved a detailed examination of the schedules filed with the Board and a final determination as to whether employers named on the schedules filed by the union had granted bargaining rights or were otherwise bound to the respondent union. Local 894, the applicant herein, called no evidence to explain the failure of Local 353 to include Ellis-Don on schedule F. Respondent counsel asserts that the most reasonable conclusion from the absence of Ellis-Don's name on schedule F as submitted by the respondent union in the accreditation application is that Local 353, IBEW had abandoned by that point any bargaining rights which it may have earlier acquired.

54. The absence of evidence to explain the omission of Ellis-Don from the schedule F filed by Local 353, IBEW in the accreditation application is of concern to the Board. The question for

the Board is whether this omission, of itself, is sufficient, in the context of all the other circumstances, to cause the Board to conclude that Local 353 had abandoned the bargaining rights it had earlier obtained. The omission of Ellis-Don's name is not inconsistent with abandonment and, thus, may signify what respondent counsel asserts. However, that omission is also consistent with an assumption on the part of the Local that the accreditation application affected only specialty contractors or that schedule F speaks only to employers for whom the Local held bargaining rights but who had had employees in the past (albeit not within the previous year). It appears (and there is no cogent evidence to suggest otherwise) that the employer association represented specialty electrical contractors, not general contractors. In that context, the name of Ellis-Don may have been omitted, in the respondent union's reply, as apparently were the names of other general contractors who had signed the working agreement, to reflect the framing of the original application. The question is not what is the most reasonable or a reasonable inference from the omission of Ellis-Don's name but whether the omission signifies abandonment. In the Board's opinion, it is more probable than not that the omission of Ellis-Don's name from schedule F did not reflect an abandonment of bargaining rights. As well, the context of a consistent pattern of Ellis-Don's subletting electrical work to "union" contractors prior to the accreditation application, although not necessarily conclusive proof of the existence of bargaining rights (see paragraph 46 above), cannot be ignored. Given the Board's finding that the working agreement was duly executed by the parties and constituted a series of voluntary recognition agreements, including the voluntary recognition of Local 353, and given that the working agreement was never terminated but, rather, that at least with respect to the subcontracting of electrical work, Ellis-Don fully complied with that agreement for many years with Ellis-Don receiving the advantages of the working agreement during that period, the Board is not satisfied, as a matter of fact, that the bargaining rights of Local 353 were abandoned because of the omission of Ellis-Don's name from schedule F. In short, considering all the circumstances, the Board does not find that Local 353 abandoned its bargaining rights prior to the introduction of province-wide bargaining.

55. Both counsel addressed the issue of abandonment subsequent to the introduction of the province-wide bargaining scheme. Arguments similar to those by respondent counsel were found in *R. Reusse Co. Ltd.*, *supra*. In that case, given the Board's finding of abandonment prior to 1978, the Board did not deal with those arguments except to state that the Board was not implying any disagreement with the principles dealt with in cases such as *Lorne's Electric*, *supra*, *Culliton Brothers Limited*, *supra*, etc. The Board has carefully considered the arguments of respondent counsel herein with respect to "post province-wide bargaining abandonment". However, the Board is not persuaded that the reasoning in such cases as *Lorne's Electric*, *supra*, or *Culliton Brothers Limited*, *supra*, is erroneous or no longer applicable. The Board sees no reason to set out those principles in this decision but, rather, adopts that reasoning. The Board does not regard the reasoning in *Ontario Hydro*, *supra*, as undermining the *Lorne's Electric* line of cases. Further, and without departing from the reasoning in *Lorne's Electric*, the Board notes that the evidence of subcontracting by Ellis-Don post 1978 would not sustain a finding of abandonment in any event. The Board's comments in paragraphs 45 - 49 above are apposite in the instant case to the post 1978 period as well. The Board does not accept respondent counsel's argument that, post 1978, any non-union electrical subcontracts outside the geographic jurisdictions of Local 894 and/or 353 should be "held against" those Locals in the context of abandonment. Outside those geographic jurisdictions, there were some examples of non-union electrical subcontracts although the Board can not ascertain the value of those subcontracts in terms of the total value of all projects in those areas in that period. However, even without that comparison, those non-union subcontracts may not properly serve, in the Board's view as evidence of abandonment by Locals 894 and/or 353. The Board, in passing, would add that the Board's decision in *Marineland of Canada*, *supra*, is consistent with the *Lorne's Electric* jurisprudence. In *Marineland*, *supra*, the Board looked at conduct subsequent to 1978, not to find abandonment post the imposition of the province-wide scheme, but to assist in assessing the

meaning or effect of the union's inactivity before that date. In the instant case, examination of the post 1978 period does not ground a finding that bargaining rights were abandoned prior to 1978. Rather, as noted, the pattern continued as before, i.e., Ellis-Don continued to subcontract electrical work overwhelmingly to "union" contractors (until the Trent project which is the subject of the instant grievance).

56. For the foregoing reasons, this grievance is hereby upheld. The 1962 working agreement created bargaining rights as between Local 353, IBEW and Ellis-Don through voluntary recognition. Those bargaining rights were not abandoned prior to the introduction of the statutory province-wide bargaining scheme and, by amending legislation, were extended to other affiliated bargaining agents, including Local 894. Nor were those bargaining rights abandoned subsequent to the introduction of province-wide bargaining. The parties agreed that Ellis-Don had sublet electrical construction work which would be covered by the provincial ICI agreement to a "non-union" electrical contractor. That subcontract violated the Provincial Agreement. The Board notes the applicant's position that no relief is sought for the period prior to the Trent project. The question of damages is remitted to the parties. Should they be unable to resolve that issue between them, the Board retains jurisdiction to deal with that matter or any other matter arising from the interpretation or implementation of this award.

DECISION OF BOARD MEMBER J. TRIM; February 28, 1992

1. I can agree with the finding of my colleagues that the Company representatives signed the working agreement and that the agreement is therefore binding on the Company. However, I regret that I must dissent with the majority in the remainder of the decision.

2. I am of the opinion that my colleagues have failed to properly interpret the effect of the working agreement and have improperly interpreted the applicable provisions of the *Labour Relations Act*.

3. I have difficulty with the concept that an employer can grant voluntary recognition to a trade union in a situation where the union could not obtain bargaining rights by certification, i.e. there are *no* employees in the bargaining unit for which the employer gave the union bargaining rights. It was admitted in this case and in the case of *Harbridge & Cross* that the employer has never employed tradesmen represented by the union in question.

4. The majority in this decision, in interpreting the working agreement, based their decision on the *Harbridge and Cross* case. That decision was, in my view, in error. The Board found, by interpretation that paragraph two of the working agreement granted voluntary recognition to the painters' union for "all employees engaged in painting". In my opinion you cannot interpret paragraph 2 to support that finding. Under section 16(3) of the Act a voluntary recognition agreement must provide for a defined bargaining unit. It is clear that under paragraph 5 of the working agreement the employer did recognize the applicable unions for the defined bargaining units in the six civil trade agreements between the General Contractors' Section of Toronto Construction Association by reason of agreeing to be bound to those agreements. Paragraph 2 cannot be interpreted to apply to the balance of the tradesmen represented by the affiliated unions of the council and in particular for "all employees engaged in painting".

5. The legislation which created province-wide bargaining in 1978 and the amendments which extended bargaining rights in 1980 recognized voluntary recognition obtained by affiliated local unions or *councils of those affiliated trade unions*. References to councils in that legislation, as

amended, cannot, therefore, be interpreted to include local Building Trades Councils that have as members local unions not affiliated by trade and craft.

6. In regard to abandonment by reason of the accreditation procedure, it is my opinion that the failure of the affiliated unions, not within the scope of paragraph five of the working agreement, to list employers who signed the working agreement supports the interpretation of the working agreement that I have set out above. In other words, those affiliated unions did not hold bargaining rights for the employers who had signed the working agreement. Under the accreditation provisions if an employer is not listed on Schedule "E" and "F" the union has acknowledged that it does not hold bargaining rights for such employer. That is why in the recent Sewer and Watermain Accreditation the Board did not create a Schedule "F" but simply noted that the union would have to prove their bargaining rights for employers not listed on Schedule "E" in future Board proceedings involving such employers.

7. For these reasons, I would dismiss this grievance by the IBEW.

1575-91-R; 1902-91-U Labourers International Union of North America, Local 607, Applicant/Complainant v. Grant Development Corporation and/or Pic Heron Bay Indian Band, Respondents

Certification - Construction Industry - Employer - Evidence - Practice and Procedure - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. A. Correll* and *R. R. Montague*.

DECISION OF THE BOARD; February 14, 1992

I

1. This is an application for certification which has been consolidated, and is being heard together with a related unfair labour practice complaint. A key issue in the proceeding is the identity of the *employer* of the individuals whom the trade union seeks to represent. Briefly put, these workers were engaged on a construction project near Thunder Bay and the union claims that they were *employed* by one or other of the named respondents. Each of the named respondents denies that it is the "employer" for the purposes of the Act, and each respondent points to the other as the probable "employer" for *Labour Relations Act* purposes. This issue is important because:

- (a) in the certification proceeding the union acquires bargaining rights for a particular employer which is thereafter obliged to engage in collective bargaining in respect of the employees whom the union represents; and,

- (b) in the unfair labour practice proceedings, it is “the employer” of any “employees” unlawfully discharged who will bear primary responsibility for that discharge.

We might note that pursuant to section 91(5) of the Act, it is “the employer” of the employees allegedly improperly dealt with who bears the onus of proof in an unfair labour practice proceeding. We might also add that, in this case, it appears that the named respondents either individually or together are the only possible “employer” for labour relations purposes. There is no other commercial entity identified which might occupy that position.

2. In summary then, we have a situation in which a group of workers whom the union seeks to represent were engaged, for a time, on a construction project involving the named respondents, and, through a process which has not yet been determined, found themselves suddenly “out of a job”. Neither respondent admits any knowledge of or responsibility for the way in which those workers came to be “employed” (by someone) then subsequently found themselves “unemployed”. Each named respondent points to the other - hence the union’s claim that one or the other of them must be “the employer” for *Labour Relations Act* purposes. Obviously, it is important for the resolution of this issue to identify the legal and economic elements which establish the identity of “the employer”, which requires an examination of the commercial relationship between the respondents and the subject workers. That, in turn, will entail a consideration of any commercial or business documents which bear upon the relationship between the respondents, or the respondents and those workers, as well as any evidence concerning the way in which managerial authority may have been exercised (or not) in respect of those workers.

II

3. In accordance with its usual practice, the Board appointed a Labour Relations Officer to meet with the parties to endeavour to effect a resolution or simplification of the matters in dispute between them. When that process proved unsuccessful, the Board scheduled a series of hearings, in Thunder Bay, in order to more conveniently hear the parties’ evidence and representations on the matters in dispute. Thunder Bay was chosen as a convenient location even though the Board panel and two of the three counsel came from Toronto.

4. We mention this because it was evident in the first days of hearing that there had not been a complete exchange of documents between the parties and their counsel, with the result that the Board hearing was periodically interrupted when new documents were produced, considered, compared with those that had already been introduced, or copied for counsel and members of the Board panel. We do not, at this stage, fault counsel for this situation, but the fact is that the local facilities available to the Board in Thunder Bay did not have the Fax and photocopying equipment available in Toronto, and the interruptions produced a disjointed presentation of the evidence. That is obviously undesirable from a variety of perspectives, including the additional costs which will have to be absorbed by the parties and the public if the absence of pre-hearing discovery/disclosure lengthens the litigation. In particular, this is an application which pertains to the construction industry where time is “of the essence” because employment relationships are transitory. To put the matter in practical terms: if a union is entitled to certification but, for whatever reason, is unable to obtain a certificate from the Board in a timely way, the entire exercise may be academic since the work will have been done “non-union” even though the employees concerned may have indicated an interest in trade union representation.

5. Following the initial days of hearing, the Board once again assigned an Officer to meet with the parties to pursue the further possibility of settling, simplifying or streamlining this litigation. In so doing, the Board noted the production problems mentioned above (see: the Board’s

decision of November 19, 1991). Some progress was made, but by letter dated February 6, 1992 counsel for the union wrote to the Board as follows:

• • •

In order to obtain full and complete disclosure, the Applicant has served the attached Summons to Witness upon counsel opposite for the production of all documentation referred to therein and specifically:

(a) Byron LeClair, Pic Heron Bay Indian Band

All such documentation in respect of employment in the construction industry by the Pic Heron Bay Indian Band and/or payment or supply of personnel to construction industry contractors from and after August 15, 1991.

We wish to confirm the statement of counsel for the Pic Heron Bay Indian Band that no such documentation exists other than relating to persons employed by the Band working in Pukaskwa National Park. In that regard however, we require the production of all documentation relating to employment by the Band in Pukaskwa National Park.

(b) Larry Jauvin, Grant Development Corporation

All job site time records and payroll records in respect of employment of all personnel of any trade on the Black River Power Development Project from its commencement to its completion.

We wish to confirm that Grant Development Corporation has refused to produce this documentation.

Accordingly, in accordance with the practice and procedure of the Board confirmed in the *Shaw Almex* case, we require the deposit of all documentation at the Ontario Labour Relations Board a minimum of two weeks prior to the hearings scheduled to recommence on March 2, 1992.

• • •

6. In all of the circumstances of this case, the Board sees no reason why it should not make the direction requested by counsel for the union set out in Item (b) above. It is so ordered. In addition, the Board hereby directs *all parties* in this matter to identify and list *all documents* upon which they intend to rely in respect of *all issues* (including those of a jurisdictional or remedial nature), and file photocopies of such documents with opposite counsel and with the Board no later than February 24, 1992 - being one calendar week prior to the date these hearings are scheduled to begin, again, in Thunder Bay. The identification and production of these documents is, of course, without prejudice to the parties' right to make argument about their admissibility or weight; moreover, as the Board indicated in *Shaw Almex*, such production is directed for the exclusive purpose of this litigation, and the documents may not be used for any collateral purpose.

7. The Board recognizes that this filing date is only approximately two weeks from the date hereof, however, the Board notes that this proceeding has been outstanding and counsel have been retained for many months, the hearings are already underway, the issues have already been crystallized, and there is no reason why the parties should not be fully prepared and thus able to produce those documents upon which they intend to rely. We recognize that geographic distance may impede communication with counsel (or the Board), but we do not think that that should be permitted to either contribute to prejudicial delays or multiply the public and private costs of this proceeding. We observe, parenthetically, that ultimately *someone* will be determined to be the "employer" of the labourers potentially affected by this application, *someone* will have to explain

how it came to be that they were actively at work, for a time, then were working no longer; and, on the certification application, the union will ultimately have to establish the extent to which the employees in the proposed bargaining unit wish to be represented by the union. The Board is concerned that procedural skirmishes concerning production may deflect the parties' focus from the substantive issues in this case, and unnecessarily prolong the hearings.

2152-91-U Canadian Union of Public Employees, Local 3419, Complainant v. Harrowood Seniors' Community, Respondent

Change in Working Conditions - Hospital Labour Disputes Arbitration Act - Unfair Labour Practice - Board determining that employer's failure to pay "interval" wage increases during 1990 and 1991 violating the statutory "freeze" - Union's delay in making complaint, in the circumstances, not standing in the way of a Board finding and remedial order - Complaint upheld - Employer directed to implement the wage increase for 1990 and 1991 according to its established practice

BEFORE: S. Liang, Vice-Chair, and Board Members J. A. Ronson and K. Davies.

APPEARANCES: Nancy Rosenberg, David Saunders, Betty-Ann Grondin and Donna Brimner for the applicant; no one appearing on behalf of the respondent.

DECISION OF S. LIANG, VICE-CHAIR AND BOARD MEMBER K. DAVIES; February 4, 1992

1. This is a complaint made pursuant to the provisions of section 91 (formerly section 89) of the *Labour Relations Act* ("the Act") in which the complainant (also referred to as "the union") alleges that the respondent has violated section 81 (formerly section 79) by failing to grant wage increases to the employees in the bargaining unit for the years 1990 and 1991.

2. On the day prior to the hearing, the Board received a letter from counsel for the respondent (also referred to as "Harrowood") setting out its client's position with respect to the complaint and concluding that "[n]otwithstanding the above, we have been instructed by our client not to attend before the Board at the hearing scheduled for January 14, 1992." On January 14, neither the respondent nor its counsel appeared, and the hearing accordingly proceeded in their absence.

3. At the outset of the hearing, counsel for the complainant sought to amend the complaint and relief sought to add allegations that the respondent had also failed to pay wage increases in 1989. These allegations had not been particularized in the complaint or any written correspondence. In view of this, the Board indicated that it would only grant the amendment if the complainant agreed to adjourn the hearing to give notice to the respondent of the amended complaint. After a brief recess, counsel for the complainant informed the Board that the complainant wished to proceed with the complaint, without the amendment.

4. The complainant called three witnesses in support of its complaint, Donna Brimner, Betty-Ann Grondin, and David Saunders. The testimony of these witnesses is referred to only where relevant to our decision and has been consolidated in our summary of the facts.

5. The complainant made application for certification with respect to a group of employees of the respondent on May 9, 1989. On June 19, 1989, the Board granted the complainant a certificate with respect to an all-employee bargaining unit. The union served notice to bargain on the respondent on June 29, 1989. During the course of negotiations, the union requested a determination from the Minister of Labour as to whether the respondent constitutes a "hospital" for the purposes of the *Hospital Labour Disputes Arbitration Act* (HLDAA). On February 19, 1991, a no-board report was issued with respect to the negotiations, and sometime after that the parties received the decision of the Minister that the respondent was covered by the provisions of HLDAA. The respondent has apparently applied for judicial review of this decision, but the hearing of this application has not yet occurred. The parties have also scheduled an interest arbitration hearing under the provisions of HLDAA, contingent on the results of this judicial review application.

6. The Board heard evidence that up to 1989, employees at Harrowood received two types of increases during their employment. Increases were awarded to employees for service, based on the number of hours worked ("seniority increases"). For example, in 1988, the wage schedule showed automatic increases for certain classifications after employees completed probation, then at 1875 hours of service, and then at 3750 hours of service. As well, the respondent granted automatic increases at intervals during each year ("interval increases"). The evidence was that each January, May and September wages were increased. These increases were not the product of negotiations, but were given to employees in the form of wage schedules for each classification showing the proposed increases for the next year. New employees were told that wages would be automatically increased at intervals during the year.

7. Prior to 1989, the respondent distributed a wage schedule for its employees showing a schedule of increases for 1989. According to this schedule, employees were to receive interval increases on January 16, May 29, and September 25. By September 25, the starting wage for registered nursing assistants would be \$9.05 per hour, for resident attendants and activity aides, \$6.60 per hour, for housekeeping, laundry and dietary aides \$6.60 per hour, and for dietary helpers, \$5.45 per hour. When the respondent failed to pay the scheduled increase of May 29, 1989, some of the employees complained. These employees were informed by the respondent that all wages were frozen due to the certification by the union.

8. The evidence was that the union itself believed that the respondent was not obligated to pay the interval increases during the certification process, and throughout negotiations. After the union was certified in 1989, David Saunders, the representative of the union assigned to the Windsor area, received complaints regarding the failure by the respondent to pay any increases. It was his understanding at that time that the employer was obligated to pay the seniority increases, but not the interval increases. He accordingly raised the issue of the seniority increases with the respondent's counsel, and the respondent agreed to continue seniority increases during negotiations.

9. However, the issue of interval increases was not raised with the respondent until 1991. The evidence was that Mr. Saunders was advised by the union's counsel about July, 1991 that he ought to pursue the matter. Discussions with the respondent's counsel failed to resolve it, and this complaint was filed with the Board on September 26, 1991. Since January of 1989, the only increases which have been received by employees are seniority increases, and increases required by changes to the minimum wage laws.

10. The union's counsel submitted that the circumstances demonstrate a clear-cut violation of section 79 by this employer. There is a pattern of increases from 1987 on, which was followed by

the employer until the time that the union made application for certification. Employees were aware of the schedule of increases and had a reasonable expectation that the schedule would continue. Counsel referred us to the following cases: *George St. L. McCall Chronic Care Wing of the Queensway General Hospital*, [1991] OLRB Rep. May 619; *Homewood Sanitarium of Guelph, Ontario Ltd.*, [1982] OLRB Rep. Feb. 230; *The Corporation of the Town of Meaford*, [1981] OLRB Rep. Sept. 1202; *St. Mary's Hospital*, London, Ontario, [1979] OLRB Rep. Aug. 795; *Public Service Alliance of Canada*, [1978] OLRB Rep. Sept. 854; *Lennox and Addington County General Hospital*, [1978] OLRB Rep. Sept. 843; *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859.

11. Although the respondent did not appear at the hearing, counsel for the respondent stated in his letter of January 13, 1992 that it is the position of Harrowood that it "has not breached the Labour Relations Act as alleged or at all". He states that prior to the certification of the union, the employer and representatives of the employees were unable to agree to the amount of a wage increase and shortly thereafter, the union made its application for certification. He further states:

...

We note that during these negotiations both the Union and our client tabled proposals on wages. During these negotiations, the Union never took the position that the employees were entitled to a wage increase under Section 79 [now 81] of the *Act* nor did it allege a breach of Section 89 [now 91] in this regard until shortly before filing the within Complaint.

Finally, we note that the Union has consistently maintained that our client's facility is subject to the provisions of the *Hospital Labour Disputes Arbitration Act* and a Board of Arbitration under that Act has been empaneled [sic] and will hold an arbitration hearing in April, 1992, subject only to the February 27, 1992 hearing of the employer's Application for Judicial Review of the Minister of Labour's decision finding our client's facility to be a hospital under the terms of the *Hospital Labour Disputes Arbitration Act*.

Decision of the Board

12. Section 81 of the Act states:

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

13. Section 13 of HLDAA provides that for employers covered by HLDAA, notwithstanding section 81 of the Act, the statutory freeze in section 81 continues until the trade union is declared to no longer be the bargaining agent for the unit of employees.

14. On the evidence presented, we are satisfied that the complainant has established a violation of section 81 of the Act. In *George St. L. McCall Chronic Care Wing of the Queensway General Hospital, supra*, the Board stated:

20. ... The Board has consistently found that the failure of an employer to pay a wage increase or otherwise continue with or institute an improved working condition during the statutory freeze, in accordance with a pre-existing pattern or a promise to do so, constitutes a breach of the freeze provisions. Collective bargaining does not occur in a vacuum. In our view, it is both contemplated by the legislation and appropriate that the basis for collective bargaining be the pattern of the employment relationship, and the resulting reasonable expectations of employees, including any pattern or expectation of wage increases.

15. We find that the evidence establishes a pattern of automatic increases payable at intervals during the calendar year. Employees were told of these increases at the time of hire, and were given schedules each year showing the intended increases. There is little doubt that in view of this pattern, the employees had a reasonable expectation of such increases continuing in 1990 and 1991. Although the *amounts* of these interval increases do not appear to be consistent from year to year or interval to interval, the *practice* of giving an increase at established intervals was.

16. We have some concern over the length of time which it took the union to make this complaint known to the employer, and then bring the matter before the Board. It is certainly unfortunate that the parties are having to deal with events which date back as far as May of 1989. As the union candidly acknowledged and as was stated in the letter from respondent's counsel of January 13, the union did not raise these issues with the respondent until shortly before filing this complaint. However, in this letter, counsel for the respondent does not urge that any particular result to flow from this and was not present at the hearing to elaborate on its position. Also, in any event, if the violation commenced in 1989, it is also true that it continued until 1991.

17. In the result, the Board finds that the respondent has violated section 81 of the Act and orders the respondent to implement the wage increases for 1990 and 1991 according to its established practice, forthwith. The Board remains seized of this matter to deal with any disagreement which may arise out of the implementation of this order.

DECISION OF BOARD MEMBER JAMES A. RONSON; February 4, 1992

1. This complaint was filed on September 27th, 1991. It was scheduled for a hearing on January 14th, 1992. On January 2nd, 1992 the respondent employer, by its counsel, requested that the hearing take place in Windsor which is but a short distance from the location of the employer's facility at Harrow. The applicant union consented to the change of venue, provided that the hearing take place on January 14th. Unfortunately, by reason of scheduling difficulties, the Board was unable to move the venue of the hearing to Windsor. On January 13th, counsel for the employer advised the Board that the employer would not be attending the hearing the next day. No request was made for an adjournment so that the matter could be heard in Windsor.

2. So we heard evidence only from the union's witnesses. That evidence is concisely set out in the decision of my colleagues. The presentation of the evidence by the union witnesses was

also concise and very frank. There was no hesitation in disclosing the nature of the problem that arose between the parties.

3. Both the union and the employer were of the belief that the “freeze” period preceding the negotiation of the first collective agreement between the parties prevented the employer from giving its employees incremental or “interval wage increases”. Then, in May 1991, along came the decision of the Board in the *Queensway Hospital* case. There is no evidence that the union ever gave its consent to such increases being paid by the employer until August, 1991.

4. It was the unilateral practice of the employer to prepare a sheet showing the various classifications of employees and the incremental increases that each class would receive during the next year. The last such sheet was prepared for 1989. The union chose not to claim such increases for 1989 for the reasons set out in the decision of the majority. The claim before us only concerns the years 1990 and 1991. That raises another problem for there is no evidence that, absent the union, the employer would have paid such incremental increases in those years. Quite to the contrary, when the union demanded such increases in August, 1991, the employer refused to make any.

5. We were told that the parties settled the language of their collective agreement fairly quickly. Their impasse came over monetary issues. Albeit by “mistake” they mutually proceeded with a course of conduct. Now the union seeks to reverse its position and have the employer found guilty of an unfair labour practice. I think the union has delayed much too long in seeking the payment of some nebulous amount for the years in question.

6. For these reasons I would dismiss the claim.

0466-91-R United Food and Commercial Workers International Union, C.L.C., A.F.L., C.I.O., Applicant v. The Homewood Sanitarium of Guelph Ontario Limited c.o.b. as **Homewood Health Centre**, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Whether “ward clerks” should be included in service bargaining unit - Board rejecting employer submission that ward clerks’ union membership evidence should be examined to determine the issue - Board ruling that where a union applies for certification for a unit that is appropriate, it is entitled to that unit even though there is a plausible alternative description which would also be appropriate - Bargaining unit sought by union including “ward clerks” found to be appropriate

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members J. A. Rundle and C. McDonald.

APPEARANCES: Cindy D. Watson, John Forster and Mike Duden for the applicant; W. Thornton, Lynda A. Coulter, Lois Taylor and Susan Crawford for the respondent; Theresa Lockerbie and Laura Ward for the objectors.

DECISION OF THE BOARD; February 26, 1992

I

1. This is an application for certification in which there is a dispute (among other things) about the description of the unit of employees appropriate for collective bargaining. The union claims that the bargaining unit should include employees in the classification of “ward clerk”. The employer responds that the ward clerks are a “borderline group” who might be conveniently included in either an “office” or a “service” unit. The employer submits that in order to decide where they should fit in this case (i.e. what the “appropriate” bargaining unit is), we should examine the union’s membership evidence to determine whether any, or a majority of the ward clerks wish to be represented by the applicant. In effect, counsel for the respondent urges the Board to consider union *membership* as a proxy for employee wishes about the description of the bargaining unit. The respondent’s written submission includes the following:

“For this Homewood application, the parties have agreed to the proposition in paragraph 1, above [“ward clerks fit quite comfortably into either an office and clerical unit or the service unit”]. However, the union does wish to represent Homewood’s ward clerks. The Respondent submits because ward clerks are a “borderline” group and do not clearly or necessarily fall within either the service or the office units, the Board should consider whether there is an indication (based on the membership evidence filed with the Board by the applicant) from the ward clerks regarding whether they wish to be included in the service unit”.

2. This issue was identified by the parties and addressed by the Board in paragraph 7 of its decision of June 21, 1991. For convenience, we reproduce that paragraph here:

7. Notwithstanding the parties’ agreement on the dimensions of their dispute, the Board directs the parties’ attention to several paragraphs from its decision in *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. There, as here, there was a dispute about the bargaining unit configuration involving, *inter alia* “ward clerks”. After a long discussion of the Board’s role under section 6(1) of the Act, the Board observed, at paragraph 23:

23. We might make an additional but related observation. *We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.* In this case, for example, the process of bargaining unit determination has already taken up more than a year and, fifteen days of hearing, with the prospect of many more. (*Kidd Creek* is still pending before the Board after eighteen months and about a dozen hearing days.) That delay may be seriously prejudicial to the applicant union, even if its position is ultimately accepted, and, in the instant case, it will undoubtedly be of concern to the large number of employees who support the union but whose rights remain in limbo until this Board determines the group of their fellow employees with whom, by law, they must bargain. It is also a matter of concern to that group of employees whom the union does *not* seek to represent, and who may not wish to be represented, but who the Hospital says must be included in the unit. They may well have some difficulty understanding why they should be swept into the ambit of collective bargaining against their wishes and despite the union’s express position that it does not seek to represent them. Having regard to the purpose of section 6(1) one might well ask whether the resolution of the issues in dispute here really justifies the cost and potential prejudice. To put the matter more concretely: are the distinctions which the parties urge upon us significant from a labour relations perspective; or are they like the distinctions among paramedical employees considered by the Board in *Stratford General Hospital* - real, and to them important, but not determinative when it comes to drawing a workable bargaining unit.

And in respect of the situation of ward clerks, the Board said this:

46. It is apparent that there are factors which would support the inclusion of ward clerks in the service bargaining unit, and factors which might suggest that they could appropriately be grouped with the Hospital's other office and clerical employees. The work of a ward clerk revolves around a particular ward or clinic. They do not work in an office setting, and they receive most of their direction from the registered nurses on the ward. On the other hand, there are other Hospital clericals who do not work in a business office setting, the ward clerks' functions are of a "clerical character", and to the extent that their duties complement those of the registered nurse, it will be recalled that the RN's are not themselves in the service unit. Counsel for CUPE pointed out that in some wards there were, in fact, no RNA's.

47. The evidence respecting the ward clerks is equivocal, and this ambivalence is also reflected in the general collective bargaining practice. There is considerable variability in the way various hospitals have treated ward clerks and there is nothing in the evidence to suggest that one characterization should be preferred over the other. CUPE put before the Board a number of collective agreements in which ward clerks have been included in an office and clerical unit. The Hospital put before the Board a number of collective agreements in which ward clerks have been included in the service unit. Neither demonstrate a definitive position. The hospitals referred to are located in various parts of the province, are of different sizes, and include some teaching hospitals. For example, Kingston General Hospital and Toronto General Hospital are both teaching hospitals which exclude ward clerks from the service bargaining unit.

48. There are no Board decisions which definitively determine the position of ward clerks since no one has previously considered it necessary to address that issue. In *Owen Sound General and Marine Hospital* (cited *supra* at para. 14), the Board had to determine how to restructure bargaining units when a hospital was transferred from the government sector where *all* of the employees were included in one bargaining unit, to the jurisdiction of the *Labour Relations Act* where bargaining units had been structured quite differently. The Board in that case, without any explicit consideration of the issue, put ward clerks into the office and clerical group. So did the Board in *St. Joseph's Hospital, Windsor, supra*, where the Board (again without any issue being raised about the matter), excluded what was described as the "office and clerical staff" which included ward clerks, admitting clerks, receptionists, information clerks, mail clerks, cashiers, and switchboard operators.

49. What inference can one draw from this diversity? In our view, it supports the proposition which we have discussed earlier; that on the margins, and in this industrial relations context, there may be particular classifications which can suitably and sensibly be allocated to one generic bargaining unit or the other. The evidence and the collective bargaining practice suggest to us that the ward clerks can fit quite comfortably into *either* an office and clerical unit or the service unit. In either case, the overall bargaining unit will be "appropriate". The union does not wish to represent them, there is no representation or indication from the ward clerks that they wish to be included in collective bargaining and the employee grouping which excludes them and which the union urges upon us is appropriate notwithstanding that exclusion. In other words, whether the ward clerks are included or excluded from the "service unit", that grouping of service employees is appropriate for collective bargaining. Accordingly, we accept the union's submission that the ward clerks need not be included in its proposed bargaining unit.

The Board found that ward clerks could plausibly fit into either the "service" or "office" group, without affecting the "appropriateness" of either generic unit, or contributing to undue fragmentation. In the result, the Board accepted the unit which was applied for and hinted that the parties should not waste time and money litigating the status of groups whose inclusion or exclusion did not have real collective bargaining significance.

[emphasis added]

II

3. *Hospital for Sick Children, supra*, represents an important restatement of the Board's approach to bargaining unit determination which, of course, reflects some forty years' experience applying section 6(1) and its predecessors to literally hundreds of cases in an evolving collective bargaining system. We need not reproduce that restatement in its entirety. It suffices to say that we adopt paragraphs 12-24, and reiterate the following observation found at paragraph 14:

While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

4. These historical distinctions (full-time/ part-time, white collar/blue collar, single location/multiple location) are useful guidelines for discerning what is *an* appropriate bargaining unit in any particular case, however, in *Hospital for Sick Children*, the Board acknowledged that there may be some considerable variability without in any way compromising the policy objectives which the concept of "appropriateness" was designed to achieve. In the Board's experience, a single department or location or employee grouping was often appropriate in the particular context, but by the same token, some broader grouping encompassing several departments, locations or groupings could be equally appropriate or more appropriate without compromising the policy objectives underlying section 6(1). Indeed, broader groupings are generally more desirable than narrower ones, because they avoid the labour relations problems associated with fragmented bargaining structures (see, for example, the concerns raised in cases such as: *Bestview Holdings Ltd.*, [1983] OLRB Rep. Aug. 1250, *Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, or *Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900). But these general considerations should not be elevated to the level of legal rules or become the focus of litigation. If a union applies for certification for a unit which is appropriate, it is entitled to that unit even though there is a plausible alternative description which would also be appropriate. That is why the Board in *Hospital for Sick Children* preferred this formulation of its task under section 6(1):

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently-coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

And that is why the Board considered it necessary to express the concerns emphasized at paragraph 23 of the decision in *Hospital for Sick Children*.

III

5. In the instant case, all parties agree that the unit the applicant seeks to represent is "appropriate", and in our view, that is all that is necessary for the applicant to establish, or for the Board to determine under section 6(1). It is unnecessary to consider whether some broader or narrower unit might also be appropriate, nor is it necessary or even useful, to consider the extent to which the union enjoys support among some sub-division of an otherwise appropriate bargaining unit. Such variations will always be present in any system that does not require unanimous employee support, and they are not very helpful in answering the question posed by section 6(1). As the Board indicated in *National Trust*, [1988] OLRB Rep. Feb. 168, the bargaining unit is determined under section 6 before representation questions are addressed under section 7. "Appropriateness" does not depend upon whom the union has organized, nor would an employee

grouping, otherwise appropriate, cease to be appropriate because the union did not enjoy majority support in that unit or some sub-division of it.

6. In any event, it is important to appreciate that the signification by an employee that s/he wishes to be represented by a trade union (usually by signing a membership card) does not, in itself, indicate anything about that employee's views respecting the appropriate bargaining unit: the grouping with whom s/he "should" from a labour relations/public policy perspective be included for collective bargaining purposes. A membership card determines only whether the employee has selected a particular trade union as his/her bargaining agent. It tells us nothing about the employee's wishes with respect to bargaining unit description; that is, it tells us nothing about that employee's opinion on the classifications that should be grouped together in the bargaining unit and might ultimately be represented by the union if it can establish majority support. And of course, the *absence* of a membership card from one or more employees within a classification provides no reliable information at all about their views respecting the bargaining unit. There are no submissions from the employees themselves on this issue. We have only the employer's submission that membership evidence is an indication of employee views. It is not.

7. For the foregoing reasons, the Board concludes pursuant to section 6(1) of the Act that the unit of employees appropriate for collective bargaining, and the unit which the union seeks and is entitled to represent *includes* the classification of "ward clerk".

CONCURRING OPINION OF BOARD MEMBER JUDITH A. RUNDLE; February 26, 1992

1. I agree with the result that my colleagues have reached in this matter. I note, however, that in this case, the union's proposed bargaining unit does not result in any fragmentation of the bargaining structure.

2. I agree with the comment at the end of paragraph 4 where the Board states:

"That is why the Board in *Hospital for Sick Children* preferred this formulation of its task under section 6(1):

'Does the unit which the union seeks to represent encompass a group of employees with a sufficiently-coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.'"

[emphasis added]

3. This formulation requires that the unit requested have a sufficiently-coherent community of interest to bargain together on a viable basis while at the same time the requested unit does not cause serious labour relations problems for the employer.

4. In the hospital sector, with established provincial bargaining practices, it is especially important not to multiply the number of units and unions for the reasons the Board mentioned in the cases referred to in paragraph 4 of this decision.

5. Since the union's proposed unit is "appropriate" and does not contribute to fragmentation, it is my view that it should be granted.

2144-91-M Schneider Office Employees' Association, Applicant v. J.M. Schneider Inc., Respondent

Employee Reference - Practice and Procedure - Employer submitting that inquiry authorized by the Board ought not to proceed until the union provides additional information specified in earlier Board decision - Board noting applicability of Practice Note #4 to this situation and ruling that the Officer will determine whether or not the union has complied sufficiently with the Board's direction to permit inquiry to proceed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

DECISION OF THE BOARD; February 24, 1992

1. By decision dated November 21, 1991, the Board authorized a Labour Relations Officer to inquire into and report to the Board with respect to the duties and responsibilities of the persons whose "employee" status is in dispute herein. However, the Board also directed that the officer designated to conduct the inquiry not to begin it until the applicant provided additional information as specified (in paragraph 3 of the decision).

2. Subsequently, the parties met with the Board Officer designated to deal with the matter. By letter dated February 3, 1992, the respondent takes the position that the applicant has failed to provide the requisite information and that the inquiry authorized by the Board should not proceed until it has done so. The applicant has responded by letter dated February 4, 1992 that it is not in a position to provide further particulars with respect to the nature of the positions held by the persons whose status is in dispute or of the mischief alleged, and that a historical description is irrelevant.

3. Board Practice Note No. 4 applies to this situation. It is within the parameters of the Officer's authorization from the Board to determine whether or not the applicant has complied sufficiently with the Board's directions to permit the inquiry to proceed. Any objections to a ruling by the Officer in this respect, or to any other ruling by the Officer in the course of the inquiry (if it proceeds) is properly made and dealt with in accordance with Practice Note No. 4. We see no basis upon which to intervene at this time.

4. We do venture the following observations, however. We are hard pressed to understand how the respondent employer can say it is unaware of the particulars of positions it has itself established. It is the employer which should have the best information in that respect. Further, the applicant seeks a declaration that the persons whose status is in dispute *are* employees. On the face of the applicant's materials, its position is that the respondent is trying to circumvent or undermine the applicant's bargaining rights by improperly classifying the persons in issue as managerial. That appears to be the "mischief" at which this application is directed. It is the respondent, by taking the position that these persons do exercise managerial functions, which implicitly asserts that it would create a mischief if these persons were considered to be "employees" within the meaning of the *Labour Relations Act*.

5. On the other hand, it is not for the applicant to say that the historical dimension to this matter is irrelevant in the face of a Board direction that it provide particulars of the relevant background to this application (which we observe it has in any event addressed itself to, whether sufficiently or not is for the Officer to decide, in its December 13, 1991 letter herein).

6. Finally, the applicant has suggested that the respondent has taken the position that it

will not produce witnesses for examination in this matter until the Board has determined whether its November 21, 1991 directions have been complied with. The respondent will comply with Practice Note No. 4 in that respect and will produce persons in its employ whose "employee" status is in dispute herein as required by the Officer.

7. The matter is remitted to the Officer as previously authorized by the Board. The Officer is to proceed in accordance with that authorization and Practice Note No. 4.

1846-91-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527, Applicant v. **Ken Acton Plumbing & Heating Inc.**, Respondent v. Group of Employees, Objectors

Certification - Charges - Construction Industry - Reconsideration - Employee making "non-pay" allegation and seeking revocation of certificate - Facts pleaded not disclosing "non-pay" - Board reviewing and applying *Calvano Lumber* case in respect of "loan" issue and effect on Form 80 declaration - Reconsideration application dismissed

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

DECISION OF THE BOARD; February 20, 1992

1. By decision dated October 31, 1991 the applicant was certified as the exclusive bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency in respect of all all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin and in the County of Grey save and except non-working foremen and persons above the rank of non-working foreman.

2. By letter dated November 23, 1991 counsel for Paul McConachie, an employee of Ken Acton Plumbing and Heating Inc. requests reconsideration of the Board's decision certifying the applicant. Counsel requests an order pursuant to section 59 [formerly section 58] of the Act or in the alternative pursuant to section 108(1) [formerly section 106(1)] of the Act terminating the applicant's bargaining rights and revoking the certificate. Sections 59 and 108(1) read as follows:

59. If a trade union has obtained a certificate by fraud, the Board may at any time declare that the trade union no longer represents the employees in the bargaining unit and, upon the making of such a declaration, the trade union is not entitled to claim any rights or privileges flowing from certification and, if it has made a collective agreement binding upon the employees in the bargaining unit, the collective agreement is void.

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

In the further alternative counsel requests a vote be held.

3. In support of the request for reconsideration counsel in its letter of November 23, 1991 states:

"We are the solicitors for Mr. Paul McConachie who is an employee of Ken Acton Plumbing and Heating Inc.

On August 30, 1991 the Applicant made Application to the Ontario Labour Relations Board for Certification as bargaining agent of employees of Ken Acton Plumbing & Heating Inc.

On October 17, 1991 the Employer and the Union appeared before a Labour Relations Board Officer and consented to the Board issuing a certificate without a full hearing before the panel of the Board. The list of employees was agreed upon for purposes of the count.

Mr. McConachie has just recently retained us and advised us of a matter that is of serious concern both to our client, and to the Board.

Our client has discovered that at least one employee (and perhaps other employees) did not make any monetary payment or provide any other consideration for membership in the Applicant Union.

We have just recently determined that Jamie Lyman, an employee of Ken Acton Plumbing & Heating Inc., signed a membership card but did not pay one (\$1.00) dollar or provide any other form of consideration in exchange for his membership.

The non-payment by Jamie Lyman was not brought to the Board's attention by the Applicant before the Certificate was issued to the Applicant and was not disclosed in the Applicant's "Form 9" declaration.

On behalf of our client, we hereby request the Board to reconsider its earlier decision to certify the Applicant as bargaining agent, and seek the following relief;

1. An order pursuant to section 58 of the *Labour Relations Act* that the Applicant's bargaining rights be terminated and that the Certificate be revoked.
2. In the alternative, reconsideration pursuant to section 106(1) of the *Labour Relations Act* that the Applicant's bargaining rights be terminated and that the Certificate be revoked.
3. In the further alternative, an Order that a vote be held.

The material facts are as follows;

1. Jamie Lyman attended a Union organizational meeting at "the Dornock" on Thursday August 29, 1991 between the hours of 7:00 p.m. and 11:00 p.m.
2. At this meeting, present were Union Representatives Tom Crystal and Jack Porter and several employees from Ken Acton Plumbing & Heating Inc.
3. Before Mr. Lyman signed a Union Membership card, he indicated that he was uncertain of his decision and requested time to think about his decision. He specifically requested a vote. Mr. Lyman was advised that, without a successful vote that night, the Union would not return.
4. Shortly thereafter, Mr. Lyman's name was called to go and sign a Union membership card, at which point he stated that he had no money to pay the Union.
5. At this point, two other Ken Acton employees each placed one dollar in front of Mr. Lyman and advised him that they would pay for his membership. There was no discussion of repayment of the money advanced for Mr. Lyman, nor was there any intention to repay the money advanced.

6. The parties have not yet commenced negotiations of a first collective agreement.

7. This Application has been made with all due diligence and dispatch. Mr. McConachie retained us and obtained our opinion on or about October 29, 1991. Investigations were conducted immediately thereafter and this Application for reconsideration was brought immediately.

This Application is not made for any improper purpose. Rather the Board is asked to reconsider its decision based on the facts now known and set out above.

It is submitted that there is evidence of irregularities in the membership evidence submitted by the Applicant which should cause the Board to fully investigate and scrutinize *all* membership evidence submitted by the Applicant. There is reason to doubt that the persons who signed the Application portions of the membership cards paid the one dollar initiation fee.

It is further submitted that since there has been an involvement in the "non-pay irregularity" by Union officials, the Board cannot rely on any of the membership evidence submitted by the Applicant, nor on the Form 9 declaration signed and submitted by the Applicant.

It is finally submitted that the matter of membership evidence is a matter that goes to the very root of the Union's application. Therefore, the Applicant's bargaining rights ought to be terminated and the certificate ought to be revoked. We look forward to receiving your response with respect to our client's request for the Board to reconsider its decision to certify the Applicant."

4. On the facts pleaded in the above letter we do not find that there has been a "non-pay" or an involvement in the "non-pay irregularity" by union officials.

5. The issue of a "loan" and the effect on the Form 80 declaration was dealt with in *Calvano Lumber & Trim Co. Ltd.*, [1988] OLRB Rep. August 735, stating:

...

12. In the instant case we are satisfied that Mr. Comeau, to the extent that he thought about it at all, intended to and would have repaid the dollar to Mr. Luna, if Mr. Luna had raised the matter or really expected formal repayment; or, alternatively, that this minor amount was a gift, to be used by Mr. Comeau as he saw fit - either to buy a coffee or, in this case, to provide the token amount required to confirm his written intention to join the trade union and seek its representation. The transfer of one dollar from Mr. Luna to Mr. Comeau was a private arrangement, and, once consummated, left Mr. Comeau with a dollar to dispose of as he pleased. It was his money which was tendered on his own behalf to support his written signification that he wished to join and be represented by a trade union.

13. In conclusion then, whether the origin of the dollar in question is characterized as a "gift" or a "loan" we are satisfied that it was Mr. Comeau's money to do with as he pleased, and that advancing that sum in support of his application for union membership meets the requirements of section 1(1)(l) [now 1(1)] of the Act and provides the requisite confirmation of the written document contemplated by the statute. That being so, there is no error, omission or misstatement on the Form 80 declaration. While it might well have been wiser for the union organizer to note the loan/gift that he had witnessed, (because that might have avoided these proceedings and considerable delay), we do not think that there was anything improper in his failure to do so.

...

6. Having regard to the above the Board in the exercise of its discretion under section 108(1) declines to reconsider its decision of October 31, 1991. The request for reconsideration is denied.

3494-91-R Labourers International Union of North America, Local, 183, Applicant v. **Ledcor Industries Limited**, Respondent v. Christian Labour Association of Canada, Intervener

Certification - Pre-Hearing Vote - Timeliness - Respondent and intervener submitting that no pre-hearing vote ought to be directed because application untimely - Respondent and intervener signing new collective agreement following recent decision of the Board granting joint request for early termination of collective agreement - Applicant seeking reconsideration of Board's decision granting early termination - Board directing that pre-hearing representation vote be taken and that ballots be sealed until parties have been given full opportunity to present their evidence and make their submissions

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *J. A. Ronson* and *E. G. Theobald*.

DECISION OF THE BOARD; February 19, 1992

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.
4. The respondent and intervener asserts that no pre-hearing vote ought to be directed as the application is clearly untimely. Those parties were subject to a collective agreement with a February 28, 1992 expiry date. However, by decision dated December 19, 1991 the Board (differently constituted) granted the joint request of the respondent and intervener for early termination of that agreement. A new agreement with a February 1994 expiry date was entered into prior to the present application which is consequently untimely.
5. The applicant has sought reconsideration of the Board's decision granting the early termination. It asserts, among other things, that proper notice of that application was not provided.
6. As the Board observed in *Aluminart Products Limited*, OLRB Rep. July 26, 1990 (unreported Board File No. 0922-90-R) at paragraph 5:

5. The Board has said on many occasions that implicit in the concept of a pre-hearing vote is the idea that a vote will be taken before any hearing is held (*The International Nickel Company of Canada*, [1969] OLRB Rep. Dec. 324). The reasons for this are self-evident. The purpose of a pre-hearing vote is to provide a "quick vote" procedure, unobstructed by the kinds of delays often attendant upon the litigation and resolution of issues which may be in dispute between the parties. As the Board said in *Emery Industries Limited*, [1980] OLRB Rep. March 316:

5. It is axiomatic that in labour relations matters "time is of the essence"; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as

possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

The expedition which is integral to a pre-hearing vote would be lost if the Board began to hold hearings before the vote is taken (*Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602 and *Kenning Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293.)

7. The Board directs that a pre-hearing representation vote be taken. Having regard to the agreement of the parties the voting constituency shall be:

all employees of Ledcor Industries Limited in the Province of Ontario in Ontario Labour Relations Board Area 8 only, save and except Field Engineers, Surveyors, Safety Coordinators, clerical field staff, non-working foremen, management and office staff.

8. All those employed in the voting constituency on February 12, 1992, who are so employed on the date the vote is taken will be eligible to vote.

9. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

10. Having regard to the dispute regarding the timeliness of this application the ballots cast in the representation vote directed herein shall be sealed and the ballots shall not be counted until such time as the parties have been given full opportunity to present their evidence and make their submissions.

11. The Registrar is directed to list this matter for hearing subsequent to the taking of the vote.

12. The matter is referred to the Registrar.

3103-90-R Practical Nurses Federation of Ontario, Applicant v. The Mississauga Hospital, Respondent v. United Steelworkers of America, Intervener

Bargaining Unit - Certification - Parties - Reconsideration - Employer submitting that panel placed undue emphasis on the need to facilitate access to collective bargaining and that it would have framed reply differently had it known that the Board proposed to undertake a review of its jurisprudence - Board noting that employer aware from the outset that the union had placed the bargaining unit issue before the Board - Access to collective bargaining one of several relevant factors considered by the Board - SEIU submitting that it was denied opportunity to participate in the proceeding in that it did not have notice from the Board - Board finding that SEIU had indicated no basis on which it could properly seek standing from the Board to intervene -Reconsideration application dismissed

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

DECISION OF VICE-CHAIR M. A. NAIRN, AND BOARD MEMBER K. DAVIES: February 18, 1992.

1. We are in receipt of a letter from counsel for the respondent requesting reconsideration of the Board's decision of December 5, 1991. We have now received comments from both the applicant and intervener with respect to that request. Having regard to all of those submissions we are not persuaded that we ought to reconsider our earlier decision.

2. The Board's jurisdiction to reconsider a decision is set out at section 108(1) of the *Labour Relations Act* (the "Act") and the Board's approach to its exercise of that authority is set out in Board Practice Note No. 17. In order not to undermine the finality of its decisions the Board generally will not reconsider a decision unless it can be shown that new evidence is available which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive, or, a party seeks to make representations or objections not already considered by the Board and that party has not had a prior opportunity to raise them.

3. Although in limited circumstances the Board has entertained a request to reconsider a decision involving significant issues of Board policy we are not persuaded that it is either necessary or appropriate in this case.

4. We note firstly that the only issue that the decision deals with is whether or not a bargaining unit comprised only of employees employed as registered or graduate nursing assistants is an appropriate bargaining unit in the circumstances of the case. There is nothing in the request for reconsideration that suggests the respondent has new evidence or did not have full opportunity to call evidence or make submissions on this issue. While the respondent states that it would have framed its reply differently had it known that "the Board proposed to undertake a review of its jurisprudence", the fact is, the respondent was fully aware from the outset that the applicant had placed this issue before the Board and was intending to call evidence and make submissions in support of its position. With that knowledge, the respondent filed its reply. At no subsequent time did the respondent seek to amend its position or seek to argue in the alternative. In addition it had full opportunity and did call evidence and make submissions on the issue.

5. The respondent submits that the panel placed undue emphasis on the need to facilitate access to collective bargaining and has no such power to consider that factor in fashioning an appropriate bargaining unit and thereby the majority exceeded its jurisdiction. We only note that under section 6(1) of the Act the Board is exercising a discretion to fashion *an* appropriate bargaining unit in the circumstances of the case before it, obviously taking into account larger policy issues. One of those policy issues is and has been (see *Hospital for Sick Children* and *Stratford General Hospital* both referred to in the decision) the issue of access to collective bargaining and an employee's ability to exercise their rights under section 3 of the Act. The task is to balance that with the other relevant factors including attempts to avoid undue fragmentation and to fashion bargaining units that are viable for collective bargaining purposes. We see no reason to comment further than the decision itself.

6. The panel is aware that this decision may be seen as a shift by the Board in determining bargaining unit structures in the hospital sector. The respondent argues that this decision is also an invitation to litigation. For both those reasons the majority of the panel made the comments that it did at paragraph 48 in an attempt to provide some direction to the parties and to the larger community who may feel affected by it.

7. The respondent submits that the Board ought to hear representations from other

“stakeholders in the hospital sector” and refers to a number of trade unions. In addition we have received comments from the Service Employees International Union (SEIU) in support of the respondent’s request for reconsideration and a letter from the Canadian Union of Public Employees (C.U.P.E.). Firstly, we reject that the respondent can advance a position on behalf of trade unions who have not done so on their own behalf.

8. As indicated in the majority decision at paragraph 7, the panel received a letter from the SEIU just prior to the commencement of the final day of hearing in this matter, which letter sought leave to intervene. We advised the parties of that letter but indicated we were not prepared to delay proceedings on the basis of the contents of the letter. Implicit in that comment was the conclusion that nothing in that letter raised any basis for SEIU’s entitlement to standing in the proceedings. The Board is not, as was the Johnston Commission, an inquiry seeking opinions and submissions from a large community. The Board is charged with resolving disputes between parties of interest to that dispute. The SEIU now submits that it has been denied the opportunity to participate in the proceedings in that it did not have notice from the Board. The SEIU however was not entitled to notice of the proceeding. While it may have an interest in any policy implications of the decision for the future it has not indicated that it has any interest in this particular dispute. The Steelworkers obtained intervener status in these proceedings because it filed evidence of membership on behalf of employees affected by the application. The panel was not prepared to further adjourn these proceedings on the basis of SEIU’s initial request. We did however provide it with a copy of the Board’s decision. In its subsequent submissions it indicates no basis on which it could properly seek standing from the Board to intervene in this case. Similarly, the letter from C.U.P.E. provides no basis for its entitlement to standing in these proceedings.

9. In *Stratford General Hospital* [1976] OLRB Rep. Feb. 41 the Board discusses this issue as follows:

... In *St. Mary’s of the Lake Hospital* the Board observed:

7. It is quite a simple matter for a trade union to file evidence of representation on behalf of employees in a bargaining unit in order to participate in an application as a party. (See *Essex Health Association Case*, O.L.R.B. Monthly Report, February 1967, p. 885). If a trade union does not file evidence of representation which evidence may take the form of a collective agreement or certificate covering employees in the bargaining unit, documentary evidence of membership or some other written form of authorization, then the Board has no other recourse than to find that the trade union which has failed to file such evidence is a stranger to the proceedings and is not entitled to participate as a party.

And in *Regina v. Ontario Labour Relations Board Ex parte Northern Electric Co. Ltd.* the Court of Appeal denied a would-be appellant status to appeal a decision on the basis that the “decision...[did] not aggrieve the would-be appellant in the sense of wrongfully refusing it any legal right depriving it of any legal right, affecting any title it may have in any matter or casting upon it any legal burden”. Clearly the Society does not meet any of those tests.

9. The Board appreciates the purport of these submissions but is unable to accede to the request. The Ontario Labour Relations Board carries out its primary function by way of adjudication - the adversary presentation [sic] of reasoned argument and proofs to a neutral third party. In fact, given the legislative and judicial umbrella under which it operates the Board is required to act in this manner. (See *The Statutory Powers Procedure Act*, 1971 Stat. Ont., 1971, c.47). The interest claimed by the Society is an interest that could be claimed by another association or employer interested in the field of collective bargaining in the hospital industry and as such, in the context of an adjudicatory procedure, is too impractical to recognize. Moreover, while the Board considers the instant case to be important, it must be recognized that the Board proceeds on a case by case basis and is prepared to deviate from earlier decisions as the facts, argument and experience of subsequent cases demands. Thus the Society, when it is able to represent an affected employee, will have its “day in court”.

And see *Pillar Construction Limited* [1966] OLRB Rep. Aug. 322; *Fergus Cables Limited* [1966] OLRB Rep. Sept. 417; *Re Northern Electric Company Limited*, (1963) 2 O.R. 301, 63 CLLC 15,484; *Regina v. Ontario Labour Relations Board, ex parti Northern Electric Co. Ltd.* (1970) 14 D.L.R. (3d) 537 (Ont. C.A.).

10. For these reasons we decline to reconsider our decision. This matter is referred to the Registrar to be re-scheduled in accordance with paragraph 49 of the majority decision of December 5, 1991.

DECISION OF BOARD MEMBER W. A. CORRELL; February 18, 1992

1. I have made a dissenting finding from the majority decision in this case for which a request for reconsideration has been filed by the respondent.

2. While the request does not fulfil all the basic criteria for reconsideration under the Board's Practice Note No. 17, we must consider that this was an unusual and extraordinary decision when one considers the prior jurisprudence of the Board and the long-standing collective bargaining procedures in this sector.

3. An overturning decision and award of such magnitude is extraordinary and requires overwhelming evidence and clear disclosure of the compelling reasons that drove the majority to their conclusions.

4. The Board's Practice Note No. 17 is broad enough, in my opinion, to support a request for reconsideration in that the majority decision leaves open to question important issues of Board Policy which have not been addressed adequately by not answering in all aspects, why it overruled prior decisions or by showing in a full and forceful way its reasons for ignoring substantial precedents.

5. I support the request for reconsideration made by the respondent.

6. I also have some sympathy for the position taken by the Service Employees International Union in support of the request for reconsideration. That union wanted a chance to have their say. The Board might have given this union and other interested parties who bargain in this sector some observer status in a case of this significance.

7. It would have been useful and instructive for the Board to have heard the views of an experienced and concerned party to labour relations in the hospital sector. It would at the least have satisfied all parties interested in the maintenance of harmonious relations in this particularly complex area of labour relations, that the potential consequences of the majority decision had been explored in the fullest detail.

2423-91-R; 2684-91-U Bakery Confectionery & Tobacco Workers International Union AFL CIO CLC, Applicant/Complainant v. R.J.R MacDonald Inc., Respondent v. Group of Employees, Objectors

Bargaining Unit - Build-Up - Certification - Whether seasonal employees should be excluded from bargaining unit - Employer engaged in buying, processing and storing of leaf tobacco, not tobacco harvesting - While not at season's height of activity, October certification application was made in season - Board determining that seasonal employees and permanent employees together represent a group of employees who can, on a viable basis, bargain collectively without creating serious labour relations problems for the employer - Issue of application of any build-up principle going to representation, not to bargaining unit configuration - Seasonal employees included in unit

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

APPEARANCES: *Susan Ballantyne*, *David W. T. Matheson*, *Sean Kelly*, *Domenic Ricci*, *Walter Press* and *Stan Williams* for the applicant/complainant; *R. W. Kitchen* and *G. Tribble* for the respondent; *C. M. Harpur*, *C. J. Abbass*, *Max Meharg* and *Bill Fulkerson* for the objectors.

DECISION OF THE BOARD; February 14, 1992

1. By decision dated November 27, 1991 we advised the parties of the panel's conclusion regarding the description of the appropriate bargaining unit and referred these matters to the Registrar to list for hearing to deal with all remaining issues in dispute. In order to accommodate the further scheduling of this matter, the remaining issues are being placed before a differently constituted panel. This decision records the agreement of the parties with respect to certain matters and provides our reasons for our conclusion concerning the description of the bargaining unit.

2. Board File No. 2423-91-R is an application for certification. Board File No. 2684-91-U is a section 91 [previously section 89] complaint alleging that the respondent has violated sections 65, 67, and 71 [previously sections 64, 66 and 70] of the *Labour Relations Act* (the "Act"). By way of relief the applicant is requesting that the Board certify the applicant pursuant to section 8 of the Act and is relying on the complaint filed to support that request.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1) [previously section 1(1)(p)] of the Act.

4. Prior to the hearing the parties met with a Labour Relations Officer and were able to agree on certain issues in dispute. At the outset of the hearing the parties advised the panel of further agreements between them. The applicant originally made twenty-eight challenges to the list of employees filed by the respondent. At the outset of the hearing it withdrew those twenty-eight challenges which are listed on Appendix 1 to the Labour Relations Officer's report. In addition, the applicant had challenged three persons on the basis that they exercised managerial functions. The applicant withdrew those challenges as well. As a result, the only remaining challenges to the list of employees reflected the parties' dispute about whether or not seasonal employees should be included in or excluded from the bargaining unit.

5. The parties were agreed that the panel should determine the bargaining unit description issue prior to proceeding to any evidence with respect to the section 91 and the applicant's request for relief under section 8. Except with respect to the underlined portion, the parties were agreed on the following bargaining unit description:

all employees of the respondent employed in its Leaf Division in the Town of Tillsonburg, save and except forepersons, persons above the rank of foreperson, office, clerical, sales, technical, grading and buying staff, security guards, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, *and seasonal employees.*

It was the position of the applicant that seasonal employees were properly included in the bargaining unit. It was the position of the respondent that seasonal employees were properly excluded from the bargaining unit. The group of objecting employees took no position on this issue and, having determined that it was only this issue that would be dealt with at that time, the group of objecting employees and their counsel withdrew from the hearing.

6. The facts were not in dispute. The bargaining unit in question concerns those employees working in what is referred to as the respondent's Leaf Division. This division is generally involved in the buying, processing, and storage of leaf tobacco. Thirty percent of its product is shipped to the respondent's domestic manufacturing facility in Montreal for processing into cigarettes. The remaining seventy percent is shipped for the export market.

7. The respondent operates four locations in this division in the Town of Tillsonburg. One location is the Tillsonburg Auction Exchange, operated by the Tobacco Growers' Association. This is where tobacco is bought by the various producers at auction. The activities of the respondent's employees at that location involve the grading, sorting, buying, and loading and shipping of tobacco to the main plant located at No. 3 Highway West in Tillsonburg. On October 24, 1991, the date of application for certification, there were nine employees at the Exchange.

8. The Auction Exchange opened on October 21, 1991. It is anticipated that in the normal course it will close towards the end of March, 1992. The parties are agreed that while the date of opening and closing will vary from year to year this variation is one of a few days. During the remainder of the year the Auction Exchange is closed.

9. At No. 3 Highway West there is a processing facility as well as a small storage area and office. Employees in the office are excluded from this bargaining unit. Leaf tobacco that is bought at the Auction Exchange is shipped to this facility within forty-eight hours of its purchase. At No. 3 Highway West it is re-graded and placed in green leaf inventory. On a processing line it is then blended, threshed, sorted, dried, re-dried, and packaged. From the processing line it is initially moved to the small storage area in the plant. During this processing season (between late October and late March) the respondent hires seasonal employees. The significant number of all employees work at No. 3 Highway West.

10. From the plant the product is shipped to two larger storage facilities, one on Tillson Avenue, and the other on Wabash Road, both in Tillsonburg. At these locations it is stored and subsequently shipped either for domestic or export market. Each storage facility employs three persons within the bargaining unit. These facilities operate year-round.

11. The crop year for tobacco begins in February. At that time an agreement is negotiated between the Tobacco Growers' Association and the three major tobacco companies (including the respondent). Based on that contract, the tobacco farming community plants their allotment and during the period between late July to October that crop is harvested. The crop is brought to market between late October and the following March. Farmers cannot bring the tobacco to market prior to the opening of the Auction Exchange.

12. During the period between March and October of each year the facility at No. 3 Highway West is not fully operational. Toward the end of the season in late January to late March many

of the seasonal employees are terminated from employment. However some are kept on following the end of the processing season. The activities carried on in the plant during that period include maintenance and capital improvements and any special projects. During that period in 1991, the respondent employed thirteen permanent full-time employees and seventeen "extended seasonal" employees. The seventeen were employed to work on the installation of a burley-casing line (a capital project). That work lasted until approximately July 15th when their employment was terminated. Those individuals were re-hired on July 22nd for the purpose of completing an accelerated maintenance plan. That work lasted until approximately October 30th by which time the processing work had commenced. Those employees were then transferred to positions on the processing line or elsewhere in the facility. Over the last five to six years the respondent has employed a total of approximately thirty persons over the summer period.

13. Over the last five or six years the seasonal employees who are retained have had their employment terminated prior to the long weekend in July and are re-hired the following week. The exact number retained over the summer is dependent on the size of any capital projects underway. As evidenced in Exhibit 2 the respondent hired four additional maintenance employees in September 1991 and six additional employees to work in storage and reclaim in early October 1991. Additional hires continued. On October 21, 1991 the Auction Exchange opened. On October 23, 1991 the respondent opened its first receiving line at which time a further nineteen employees commenced working. A total of seventy-five employees are reflected on the list of employees and on Exhibit 2 as of the date of the application for certification.

14. We note that while some employees are treated as temporary or seasonal employees, their employment has been of a continuous nature. This is reflected to the extent that over the past five to six years there have been approximately thirty people employed during the "off" season.

15. Exhibit 2 reflects the dates and manner in which the respondent's processing activity continued. As of the date of hearing before this panel on November 22, 1991 the respondent employed a total of one hundred and forty-six employees. The projections for hire up to and including December 14, 1991 would reflect a total work force of two hundred and fourteen employees at the height of season. The respondent anticipates commencing its downshift in activity on January 20, 1992 continuing until March 28, 1992.

16. The respondent anticipates running a third shift on its first processing line this season. In the previous six years there has been only one other occasion when the respondent operated a third shift. Absent that third shift the employee numbers would total in the range of approximately one hundred and sixty-five to one hundred and seventy employees.

17. A little over one half of all the seasonal employees have some form of long standing relationship with the respondent and tend to return each year for employment purposes. Over the Christmas holiday period these temporary employees have their employment terminated. They are re-hired after the holidays. Statutory holiday pay, if any, is paid in accordance with the *Employment Standards Act*.

18. The respondent relied on what it described as Board policy to argue that a certification application made out of season would have seasonal employees excluded from the bargaining unit. The acknowledged corollary was that an application made in-season would include seasonal employees in the bargaining unit. The respondent argued that this application was made out of season because its substantive activity, described as processing of leaf tobacco, had not yet commenced by the date of application. In support of its position it relied on *Melnor Manufacturing Limited* [1969] OLRB Rep. Mar. 1288, *Filkon Food Services Limited* [1981] OLRB Rep. Dec.

1771, and *Cobi Foods Inc.* [1987] OLRB Rep. June 815. In the alternative, the respondent argued that if seasonals were to be included in the bargaining unit then the work force present on the date of application was not representative and the Board should apply a build-up principle and order a vote of employees at a more representative point in time. As well, the respondent noted that the question of the representative nature of the work-force on the application date is relevant to whether or not the applicant has membership support adequate for collective bargaining in the context of its request for relief under section 8.

19. The applicant argued that the Board has not recognized any distinction between seasonal or temporary employees and permanent employees in conjunction with the timing of an application for certification for purposes of the determination of the bargaining unit description. It acknowledged two activities which constitute an apparent exception to this, described as canning and tobacco harvesting. The respondent, it argued, is not engaged in tobacco harvesting and the applicant referred to the cases relied on by the respondent and in addition, *Universal Cooler, a division of Sno-boy Coolers Limited* [1967] OLRB Rep. Sept. 546.

20. In the alternative, the applicant argued that this application was made in-season and therefore seasonals ought to be included in the bargaining unit. It argued the season opened no later than the day the auction opened, that is, October 21, 1991. By the date of application, seventy-five people were employed, the bulk of whom the respondent would characterize as “seasonally” employed. The applicant further argued that the concept of build-up has no application to a seasonal work force and in the alternative it did not agree that the work force on the date of application was unrepresentative.

21. The Board’s approach to seasonal employees was summarized in *Filkon Food Services Limited*, *supra* at paragraph 4:

... More importantly, the Board has consistently refused to take into account seasonal fluctuations in a work force, from the point of view of either “build-up” or bargaining unit configuration, outside of certain historically - recognized industries such as canning and tobacco - harvesting (see *Universal Cooler*, (1967) OLRB Rep. Sept. 546; *Melnor Manufacturing Ltd.*, (1976) OLRB Rep. May 215).

22. In applying section 6(1) of the Act in determining an appropriate bargaining unit the Board asks whether the unit that the applicant seeks to represent encompasses a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. The respondent does not suggest that if the application were made in-season that the seasonal employees here ought not to be included in a bargaining unit with permanent employees. Although respondent counsel denied applicant counsel’s assertion in argument that the parties were agreed the employees shared a community of interest, it is implicit in the respondent’s position and there is little in the evidence to suggest otherwise. During their period of employment the seasonal employees compliment the work of the permanent employees. Some “extended seasonals” work essentially year round with the permanent employees engaged in similar functions. While their terms of employment may differ that, in and of itself, does not lend itself to the conclusion that these employees do not share a community of interest. Nor is there any suggestion that serious labour relations problems would be created for this employer by including seasonal employees in an all-employee bargaining unit.

23. Whether or not a distinction or exception for tobacco harvesting and canning continues to be sound in the context of the Board’s role under section 6(1) to determine an appropriate bargaining unit is not a question that this panel is required to answer. We are satisfied that the activity

of the respondent is as described by it at the hearing, that is, the buying, processing, and storing of leaf tobacco, and as such is not properly described as tobacco harvesting. In that circumstance we see no reason to depart from the conclusion in *Filkon Foods Limited* to include seasonal employees in the bargaining unit.

24. In any event, we are further satisfied that as of October 24, 1991 the season, while not at its height of activity, had clearly begun so as to conclude that the application for certification was made in-season. The inclusion of seasonal employees in the bargaining unit is appropriate. The seasonal employees (whether truly seasonal or employed on a temporary but continuous basis) and the permanent employees, together represent a group of employees who can, on a viable basis, bargain collectively without creating serious labour relations problems for the employer.

25. The issue of the application of any principle of build-up is one that goes to representation, not to bargaining unit configuration. The applicant in this case has acknowledged that if the panel were to conclude that seasonal employees are properly in the bargaining unit it can only rely on section 8 in support of its certification application. It has not filed sufficient evidence of membership so as to be otherwise entitled to certification or a representation vote.

26. This panel is not seized. The matter has been listed for continuation on March 11, April 2, 3, 9, 16 and May 11, 1992 before a differently constituted panel of the Board to hear the evidence and representations of the parties with respect to the outstanding section 91 complaint and the applicant's request for section 8 relief.

0755-90-U; 0851-90-R; 0978-90-U Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Complainant v. **Royal Homes Limited**, Respondent; Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. **Royal Homes Limited**, Respondent v. Group of Employees, Objectors; United Brotherhood of Carpenters and Joiners of America Local 3054 and Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Complainants v. **Royal Homes Limited**, Respondent

Certification - Certification Where Act Contravened - Discharge - Practice and Procedure - Unfair Labour Practice - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspension, certain demotions and lay-offs motivated by anti-union animus - Employer harassment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the Act

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *N. L. Jesin*, *A. Wall*, *J. Kouba* and *K. Fenwick* for the applicant/complainants; *H. P. Rolph*, *P. Venema* and *R. Barron* for the respondent.

DECISION OF THE BOARD; February 28, 1992

1. This is an application for certification in which the applicant has requested relief pursuant to section 8 of the *Labour Relations Act*, together with two complaints under section 91 [formerly section 89] of that Act. On January 7, 1992, we issued a decision setting out certain findings and directing a number of remedies. This decision records our reasons, as well as our findings on other matters.

2. The respondent is a manufacturer and installer of prefabricated houses which operates two plants, one in Wingham, Ontario and the other in the Peterborough area. Those operations are controlled by a board of directors consisting of Hans Kuyvenhoven, the founder of the company, his son Doug Kuyvenhoven, (whom we will refer to as Doug Kuyvenhoven to distinguish him from Mr. Kuyvenhoven, senior), and Pieter Venema. The Wingham plant was organized by Local 3054, a sister local of the applicant in 1989. That year, the Peterborough plant was opened to accommodate a growing market for the respondent's products. The applicant, Local 27, now seeks certification as the bargaining agent for employees at the Peterborough plant.

3. Shortly after the Peterborough premises were opened, the respondent set up a worker committee. Members of the committee were elected by their fellow employees, and their functions included both administering a quasi-grievance procedure and a consultative and advocacy role. One of the members of that committee was Laurie Snow. In February of 1990, Ms. Snow became disenchanted with the worker committee and submitted her resignation. After discussions with a number of other employees, she contacted the applicant in April of 1990. Two or three initial meetings were held with a small group of employees, who then began recruiting other employees to join the applicant on April 30, 1990.

4. The respondent became aware of the campaign almost simultaneously. At a meeting on April 28th, the directors discussed a proposal by Mr. Kuyvenhoven to address a number of problems at the Peterborough plant. Those problems are described in a memo which includes references to both productivity issues and to the union campaign. At that time, Mr. Kuyvenhoven proposed a number of courses of action, including management changes, closing the plant and having a meeting with employees to "put everything on the table". Mr. Venema testified that Mr. Kuyvenhoven wished to inform workers that the Peterborough plant could be closed, but that the directors decided otherwise. It was agreed, however, that there would be a meeting to talk to employees.

5. On the morning of May 2, 1990, Ken Baynton, vice-president of manufacturing for the Peterborough plant, approached Ms. Snow on the plant floor and chastized her for bringing a union in. He then called a meeting of all employees and addressed them in the lunchroom. Mr. Baynton told them that contrary to rumours going around the plant, he himself was there to stay. Jan Van Kooten, one of the respondent's witnesses and a member of the worker committee, told the Board that Mr. Baynton wished to find out from employees why there were so many problems on the line, and indicated to employees that they would have to work together so that they could keep working. According to Mr. Van Kooten, Mr. Baynton also said that if things did not improve, they could all be out of jobs. He denied that Mr. Baynton mentioned anything about the union. However, Barclay Walst, one of the respondent's supervisors and a respondent witness, testified that Mr. Baynton opened the meeting by saying that the company knew that there was a union campaign, and that it had called the meeting so that employees could discuss the matter with the worker committee. In any event, the meeting was then turned over to the worker committee and Mr. Baynton, Roy Crum, the plant manager, and the supervisors left.

6. Kevin Crawford, one of the lead hands, asked Mr. Crum if the lead hands should remain at the meeting. Mr. Crum replied that they should. As a result, approximately seven lead

hands stayed in the room. Frank Berenger, another member of the worker committee, then provided employees with his views about unions, to the effect that they were not worth the trouble and that they just “gouged your pocket”. Mr. Van Kooten made similar remarks and then asked everyone who wanted the union to put up their hands. No one did. He then asked whoever was getting cards signed to stand up and give their views, as they were here to discuss why they needed a union. When no one did, he and another member of the worker committee, Kathy Townsend, commented that employees supporting the union were “gutless”. A somewhat heated discussion then ensued.

7. At some point during the meeting, the worker committee passed out a letter which had originally been circulated to employees in July of 1989. The letter recites certain information and is critical of unionization. It was signed by the members of the worker committee in July of 1989, which included Ms. Snow. Mr. Van Kooten testified that the letter was handed out because Ms. Snow was now supporting the union, and the worker committee wanted employees to know “exactly what she was up to” because she had changed her mind. When the letter was distributed, Mr. Van Kooten told the meeting that a person who had signed it then had since changed her mind. This was clearly directed at Ms. Snow since she was the only woman on the committee, and Mr. Van Kooten had used feminine pronouns. Ms. Snow then stood up and said that a person had a right to change their opinion. The letter is virtually identical to one circulated in August of 1988 by the respondent to Wingham employees during the Wingham organizing drive. Mr. Van Kooten denied that the letters were related, even when the company’s letter was brought to his attention in cross-examination.

8. Ms. Snow also testified that Mr. Van Kooten said at the meeting that if the union got in, there would be a freeze on employees’ wages. In addition, she told the Board that as employees left the meeting, he said that anybody who was signing cards would get what was coming to them. Mr. Van Kooten denied making both these statements.

9. In the meantime, Mr. Crum, Mr. Baynton and two of the supervisors, Mr. Walst and Gary Beyers, had repaired to Mr. Crum’s office when they left the meeting. This office is situated across a large hall some ten or fifteen steps from the lunchroom. If the door is open in the lunchroom, Mr. Walst told the Board that employees would be able to see right into Mr. Crum’s office as a result of a large window in the office which faced the lunchroom. According to Mr. Crawford, the lunchroom doors were being repaired and as a result, the centre post was missing. This left a gap through which employees could see. Ms. Snow, and two other employees who attended the meeting, Rob Scriver and Joe Crosgrey, testified that they could see Mr. Beyers and Mr. Walst outside the door of the lunchroom. It was clear that none of these witnesses was in a position to say that they remained there throughout the entire meeting, but they did say that the two supervisors were there on a number of occasions when they glanced in that direction. Ms. Snow told the Board that when Mr. Van Kooten received no response to his questions with respect to support for the union, he walked over to Mr. Beyers and spoke to him for a minute. Ms. Snow was of the view that Mr. Van Kooten was getting instructions from Mr. Beyers. Mr. Crosgrey and Mr. Scriver clearly thought that Mr. Beyers and Mr. Walst were at least eavesdropping on the meeting.

10. Mr. Van Kooten acknowledged that he might have had a discussion with Mr. Beyers during the meeting, although he indicated that it was because management was concerned that the meeting was taking such a long time. This is consistent with Mr. Walst’s testimony in which he told the Board that Mr. Beyers was sent three or four times by Mr. Crum to inquire as to how much longer the meeting would be. In any event, Mr. Van Kooten testified that the people in Mr. Crum’s office would have heard the discussion in the meeting, because it was so loud that they

would have heard it on the other side of the plant. In his view as well, employees would have assumed that management knew what was going on at the meeting as a result.

11. The worker committee meeting ended at lunch time and employees commenced their lunch break. Ms. Snow told the Board that while they were eating lunch, Mr. Kuyvenhoven entered the room and told employees he wanted to talk to them, and that he was “damn mad”. He told one employee who was warming up his lunch in the microwave to stop, and pay attention to what he was saying. He then continued that he had heard that employees were getting a third party involved, and that he did not think they needed it. Mr. Kuyvenhoven proceeded to list current employee benefits, such as work boots, life insurance, and so forth. He went on to say that there would be layoffs at the Wingham plant, but that if Peterborough employees co-operated, they would not get “the same”. Mr. Scriver understood Mr. Kuyvenhoven’s comments to mean that if Peterborough employees did not have a third party present, they would likely be working while Wingham employees were laid off. Mr. Crawford’s evidence is similar to that of Mr. Scriver and Ms. Snow. Generally speaking, the applicant’s witnesses did not recall any other members of management present at this meeting, and did not recall Mr. Kuyvenhoven reading from notes.

12. Ms. Snow then described a third meeting that day at which Mr. Kuyvenhoven announced that Mr. Baynton and Mr. Crum had been fired. It is clear from Mr. Venema’s testimony that the directors had decided on April 28th to give Mr. Baynton until May 31st to raise productivity levels. However, four days later, the company decided to change that plan. This was apparently a popular move with employees, some of whom had previously complained to Mr. Kuyvenhoven about Mr. Baynton. Mr. Kuyvenhoven also introduced Bill Dobie at that time, the plant manager at the Wingham plant, who was going to replace Mr. Baynton and Mr. Crum on a temporary basis. According to Mr. Crosgrey, Mr. Kuyvenhoven then referred to a third party again, but this time said that it was up to workers to decide for or against a union, although with he, management and the workers working together, they did not really need a third party. Mr. Kuyvenhoven then asked questions of employees with respect to what they thought, and what they wanted to see done. Mr. Crosgrey and Ms. Snow recalled that Mr. Kuyvenhoven was referring to notes at this meeting.

13. Mr. Kuyvenhoven and Mr. Venema both testified that Mr. Kuyvenhoven spoke only once to employees on May 2nd. Mr. Kuyvenhoven was not sure whether it was at lunch time or break time, although Mr. Venema said that it was at lunch time. Both told the Board that Mr. Kuyvenhoven read from prepared notes, and that his only reference to a third party was to the effect that he understood a third party had been invited in, and if they could help with increased sales and improve production, they were welcome to come in. Mr. Kuyvenhoven also told the Board that he referred to times being tough and other plant closings as well. There is no dispute that the reference to a third party was a reference to the applicant union. Mr. Venema agreed that Mr. Kuyvenhoven mentioned that lay-offs were upcoming at Wingham, but was not sure whether he said this on May 2nd, or at subsequent meetings on May 14th and June 6th. He acknowledged that Mr. Kuyvenhoven had said something to the effect that if employees co-operated they would not be laid off, but indicated Mr. Kuyvenhoven was referring to productivity at the time.

14. On May 7th, John Little, who supervised the respondent’s site installations, was given the position of plant manager at Peterborough, and Mr. Dobie returned to Wingham. Approximately one week later, a union meeting was held. Ms. Snow told the Board that those who attended stopped asking questions after Mr. Van Kooten showed up some twenty minutes after the meeting started. Of twelve to fourteen employees who attended that meeting, seven were subsequently laid off on May 14th, two were demoted at the beginning of June and two are no longer there for other reasons.

15. The seven employees who were laid off were part of a larger group of twenty-two employees who were laid off two days after the union meeting. It appears that the respondent's supervisors were not informed of the lay-offs until approximately ten to fifteen minutes before they occurred. At that point Don McMillan, one of the supervisors, was handed a list of twenty-two names by Mr. Little and was told that those that worked for him should go to the lunchroom. When Mr. McMillan asked why, he was told it was none of his business. Mr. Kuyvenhoven then addressed those employees, and told them that they were to be laid off. He explained that they had the least seniority, but said that if the company had made a mistake in this regard, they should notify the worker committee or management. There was no mention of the lay-offs being temporary. The written notices given to employees referred to terminations, rather than lay-offs, and did not refer to the possibility of recall. The text reads as follows:

May 14/90

NOTICE OF TERMINATION

Dear _____

Please be advised that resulting from declining home sales and a poor outlook for the general economy your employment with the company is terminated effective May 14, 1990.

We wish you success in your search for alternative employment.

Sincerely

Pieter Venema
Vice-President
Finance and Administration

16. The meeting with employees lasted approximately ten minutes. Mr. Little then instructed Mr. Beyers and Mr. McMillan to escort employees out of the plant, telling them that he did not want the laid off employees stirring things up. After the meeting with the employees who were laid off, Mr. Kuyvenhoven met with the other employees in the plant. He told the Board that he said that 1990 was a tough year, that a small amount of new housing was required, that there was fierce competition, and that there was no money to be made. Mr. Kuyvenhoven went on to list a number of things that he said had to be done in order to keep the respondent's doors open. He also mentioned that the respondent was committed to a wage schedule that tied in with production, and stated that he was sure that these terms would be met before the scheduled date. The effect of this would be to move up a wage increase scheduled for a later date. Mr. Kuyvenhoven told the Board that he made this reference because there had been a request for wage increases, and that he was willing to advance the increase because he saw some improvement. He denied that it had anything to do with employees seeking wage increases through unionization.

17. Mr. Kuyvenhoven also indicated to employees that he wished to have good communication with everyone. He told them that the plant manager, the worker committee and the foreman were tools that were available, and urged employees to use them. According to Mr. Kuyvenhoven, by this he meant that employees had to trust management and the worker committee. Finally, he told them that if they worked like a team, they would have a job all year, and the meeting concluded.

18. There were several reasons for the layoffs, according to Mr. Venema. Although there had been a good influx of sales in the third week of April, he told the Board that sales had dropped dramatically in the final week of the month. In addition, the respondent's first fiscal quarter had been very poor with significant losses. As a result, the company was looking for ways to reduce its

costs. Mr. Venema instructed Mr. Little as one of his first tasks upon assuming the position of plant manager in Peterborough to review the staffing requirements.

19. Mr. Venema testified that he, Mr. Kuyvenhoven and Mr. Little made the decision to lay off employees on May 14th because of overstaffing, based on Mr. Little's recommendations. Those recommendations were based on an hours per unit analysis compared with the Wingham plant, which was a more efficient operation. Mr. Little, Mr. Venema, Mr. Kuyvenhoven and a personnel employee then decided which employees were to be laid off on the basis of reverse seniority. There is no dispute that employees were in fact laid off in that order.

20. Within the next six weeks, eleven of the employees who had been permanently laid off were recalled, six of them during the following week. Mr. Venema testified that this was due to attrition. However, it appears that only six employees left the respondent during this period. When Mr. Kuyvenhoven was asked why almost twice as many employees were recalled as those who had left, he replied that he did not know, and that the respondent's estimates must have been too optimistic. Mr. Van Kooten testified that the respondent was having problems after the layoff because it could not get houses built by delivery dates.

21. Mr. Kuyvenhoven held meetings with employees again on May 15th and June 6th. At the latter meeting, there was no dispute that Mr. Kuyvenhoven announced a lay-off at the Wingham plant. He also told employees that the new wage rate at Peterborough could be implemented in July if all of them worked together. In addition, and again provided that everyone worked together, things would get done as before and unless sales were "totally" dropping, there would not be a lay-off until the end of October or November, and perhaps not at all. Mr. Kuyvenhoven reiterated the importance of co-operation, said that it was a matter of survival, and referred to various businesses going into receivership and closing their doors. In his testimony, he explained that he had told Peterborough employees about the Wingham lay-offs because he did not want them to hear about it from Wingham employees. However, he told the Board that he did not know when Wingham employees had been told about the lay-offs, and did not ask about it. The layoff notices for Wingham employees are dated July 5th, approximately one month later. Subsequently he corrected his testimony and said that Mr. Venema had told Wingham employees about the Wingham layoff that morning.

22. A little over a week later, the worker committee distributed a document which compared wages and working conditions at the Peterborough plant and at the Wingham plant. The overall message of this document was that the wages and working conditions at Peterborough were substantially the same as those in Wingham, without employees having to pay union dues. The document also makes references to job security in several different ways.

23. The following day, the respondent gave Ms. Snow a letter directing her to cease asking other employees to sign union membership cards on company premises during working hours. Ms. Snow denied having collected cards during working hours. There is no doubt that she was the primary contact inside the plant for the applicant, and that she collected the most cards. On that same day, the respondent issued a letter to employees referring to rumours that the applicant had applied for certification, and setting out certain employee rights under the Act. Also on that day, the applicant filed the first unfair labour practice complaint.

24. During this period and subsequently, Ms. Snow testified that she was the subject of intensive monitoring by management while she worked. She told the Board that on June 18th for example, supervisors passed by her work station twenty-seven times, a highly unusual state of affairs. Normally she might see her supervisor once a day. Mr. Little told the Board that he firmly believed that no extra supervision was directed to Ms. Snow, and denied that he had instructed

supervisors to keep a special eye on her or her activities. In contrast, Mr. McMillan told the Board that Mr. Little asked him if he was aware that Ms. Snow was a troublemaker. When Mr. McMillan replied that he was not, Mr. Little said that he had information that she was an organizer. He told Mr. McMillan to watch out for Ms. Snow, to see if he caught her selling cards or anything to do with organizing, and to take action if he did to dismiss her. Ms. Snow was not in Mr. McMillan's work area.

25. Ms. Snow had been the only tile-setter in the Peterborough plant for approximately one year. Around this she was informed by other employees that Kathy Townsend would now be trained as a tile-setter. This was subsequently confirmed by Ms. Snow's supervisor, Mr. Beyers. Mr. Little told the Board that since Ms. Snow was the only tile-setter, the respondent wanted to train Ms. Townsend to help her, and to perform her job if Ms. Snow was not there. Ms. Snow pointed out that the fact there was only one tile-setter had never been a problem before the union organizing drive. Ms. Townsend was in a lower rated position as the plant janitor, and as previously noted, was a member of the worker committee. It appears that the effect of training Ms. Townsend to perform Ms. Snow's job would be a promotion. Ms. Snow complained both to Mr. Beyers and to Mr. Little, and ultimately another employee was trained.

26. On June 25th the applicant applied for certification, requesting that a pre-hearing vote be taken, that the ballot box be sealed and that relief be granted under section 8 of the *Labour Relations Act*. Approximately a week later, the respondent issued another letter to employees, referring to the fact that the applicant had applied for certification and again setting out certain information about their rights in a somewhat more partisan manner. Around this time, Rob Scriver and Kevin Crawford were demoted from their positions as lead hands. The respondent explained their demotions as part of an overall restructuring in which lead hands became leaders with reduced supervisory responsibilities. Only three lead hands were not given the position of leaders: Mr. Scriver, Mr. Crawford and another employee named Don Porter. These three were all given positions as regular employees rather than leaders, with the result that they experienced significant wage cuts. Mr. Crawford is Ms. Snow's common-law husband. Mr. Scriver attended the union meeting where Mr. Van Kooten was present. Mr. Porter is on Workers' Compensation benefits.

27. In June of 1990 as well the respondent issued a new wage schedule in which two additional wage levels were established at the top end of the pay scale. The previous wage schedule had been issued on February 28th, 1990 and covered a period until February of 1991. Both the previous wage schedule and the new schedule referred to the fact that if certain productivity goals were met, the wage increase scheduled for August 13th, 1990 could be moved up. In a memo dated June 4th from Mr. Venema to Mr. Kuyvenhoven and Mr. Little, Mr. Venema suggested that the changes with respect to the lead hands and leaders should ideally be announced at the same time the respondent moved up the wage increase previously scheduled for August, but that he was not sure that the respondent could wait that long.

28. On July 5th, notices of lay-off effective July 27th were given to forty-two employees at the Wingham plant. On July 10th, the applicant and Local 3054 jointly filed another unfair labour practice complaint. The following day the respondent issued another letter to employees with respect to unionization.

29. Four days later, the respondent wrote both to employees and to the applicant indicating that it was its position that the best way to resolve the application for certification was a vote. The respondent stated that it would be allowing a representative of the applicant access to its premises at specified times to speak to employees in this regard. A meeting was ultimately arranged for July 19th from 4:30 to 5:30 p.m. Notice was not given to employees of this meeting until that day, and

the notice indicated both that attendance was voluntary and that employees would not be paid for time spent at the meeting. The meeting was sparsely attended.

30. In the meantime, on July 18th the respondent issued another letter to employees consisting mainly of a comparison of the wages and working conditions at the Wingham and Peterborough plants. Like the worker committee, it is clear that the respondent wished to convey to employees at Peterborough that they had substantially the same or better wages and working conditions than the unionized Wingham plant employees. There are also references to the difficulties of decertification, the cost of union dues, super seniority for union officials during lay-offs and so forth. As a result of the new levels added to the Peterborough wage schedule, it compared favourably to the Wingham wage schedule, which would not have been the case without the June revision of the Peterborough wage schedule.

31. On July 24th, a representation vote was taken by the Board and the ballot box was sealed. At the end of July, Laurie Snow resigned and took up employment elsewhere.

32. On November 9th, 1990 notice of lay-off was given to all remaining employees at the Wingham plant, to take place in December. At the end of that month, the respondent introduced an absenteeism bonus program in the Peterborough plant. This program was similar to a program introduced the year before. The essence of the program was that employees who were not late or absent for a specified period of time would be entitled to a bonus.

33. On December 5th, the respondent notified ninety employees at the Peterborough plant that they would be laid off, effective December 21st. Forty-five of those lay-offs were temporary, and forty-five were referred to as indefinite. Those indefinitely laid off were not expected to be recalled, in contrast to those who received temporary lay-off notices. Subsequently, employee Reg Nelson complained to other employees that those up to and including Kathy Townsend on the seniority list had been laid off temporarily, but those after her on the seniority list had received indefinite layoffs. This was despite the fact that several employees in the latter category appeared to have the same seniority date as Ms. Townsend, which in his view indicated she had been favoured as a result of her position on the worker committee. It appears that no member of the worker committee was given an indefinite layoff notice. He was also critical that a number of employees who were late as a result of a freezing rain storm would be receiving the attendance bonus, including Ms. Townsend, as a result of her intervention.

34. Mr. Nelson had previously voiced complaints about employees working overtime without supervision and other matters. At that time, Mr. Dobie had called him into his office and indicated that if he had complaints to make, he should be making them to management, rather than to other employees. Mr. Dobie felt that he had a "gentleman's agreement" with Mr. Nelson in this regard. Mr. Nelson acknowledged that he had been spoken to in this manner, but felt that the characterization of it as an agreement was inaccurate. In any event, on December 11th Mr. Nelson was suspended for two days for disrupting employees. Mr. Dobie told the Board that it was his decision to suspend Mr. Nelson, and that he had been suspended for insubordination, harassment and rebellious comments against the respondent. By this, he testified, he meant that Mr. Nelson was trying to create trouble by his comments to other employees that Ms. Townsend had received preferential treatment. It was also clear that part of Mr. Dobie's concern was that Mr. Nelson was undermining the credibility of the worker committee. He told the Board that he felt that management should assist in sorting that out because there had to be a good relationship between the worker committee and management. Mr. Dobie also said that Mr. Nelson seemed to have a problem with whatever the worker committee and the social committee did, and that since most employees were on the social committee and agreed with the worker committee, Mr. Nelson was

out on a limb with a small minority of employees who did not agree with anything. Mr. Nelson filed a grievance with respect to the suspension. Not surprisingly, the worker committee decided that the suspension was justified. At the plant Christmas party several weeks later, Mr. Kuyvenhoven expressed surprise that Mr. Nelson was still there.

35. Sometime after May 2nd, Mr. Beyers took Mr. Crosgrey into his office and began talking about workers' compensation claims. Mr. Crosgrey is an employee member of the plant's health and safety committee. He then asked Mr. Crosgrey where he stood on the union issue. Mr. Crosgrey told Mr. Beyers that he was undecided. Mr. Beyers then asked him what had been happening on the floor in regard to the union. Mr. Crosgrey told him that rumours were rumours, that he did not get involved, but that every time he turned around someone was asking him to sign a union card. Mr. Beyers responded by asking Mr. Crosgrey to sign an affidavit as to who was asking him to sign a union card. Mr. Crosgrey refused. Mr. Beyers then called him an epithet to the effect that he was a coward, and Mr. Crosgrey left his office. It was not suggested that Mr. Crosgrey experienced any repercussions as a result of this incident.

36. The union alleges that the respondent violated sections 3, 65, 67, 71, 72, 81 and 82 [formerly sections 64, 66, 70, 71, 79 and 80] of the Act by laying off Peterborough employees on May 14th, by harassing Ms. Snow, by demoting Mr. Crawford and Mr. Scriver, by suspending Mr. Nelson, by laying off Wingham employees on July 27th and in December, by virtue of a number of the meetings described above and comments made at those meetings, as a result of the incident involving Mr. Beyers and Mr. Crosgrey, and by introducing the attendance bonus program. In addition to claiming various remedies under section 91, the applicant has requested certification pursuant to section 8 of the *Labour Relations Act*.

37. Section 8 provides as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

38. For a union to be certified under section 8, three conditions must be met. It must be established that there has been:

- (1) an employer contravention of the Act, so that,
- (2) the true wishes of employees are not likely to be ascertained; and
- (3) that the union has membership support adequate for collective bargaining.

39. As a result, we turn first to the question of whether the respondent has violated the Act. Section 91(5) [formerly 89(5)] applies to a number of the allegations made by the applicant in this regard. That section reads as follows:

91.-(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

40. In the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board set out its approach to allegations where section 91(5) applies:

17. What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer ... did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.*, [1974] OLRB Rep. July 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

41. Subsequently, the Board reiterated in *The Corporation of the City of London*, [1976] OLRB Rep. Jan. 990 that the anti-union motivation does not have to be the sole reason, or even the predominant reason for the activity complained of to violate the Act, so long as it is one of the reasons. Then in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, the Board described the difficulties inherent in this kind of proceeding:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti-union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.

42. In the case at hand, we have examined the reasons advanced by the respondent in some detail for the various activities alleged, not because we are adjudicating their reasonableness or their justness, but because it is "a step in the more complex process of ascertaining the employer's motivation" (*Hallowell House Ltd.*, [1980] OLRB Rep. Jan. 35).

43. In this regard we turn first to the allegation that the lay-off of Peterborough employees on May 14th was tainted by anti-union animus. The three reasons given by the respondent for the lay-offs were the poor first quarter report, declining sales and overstaffing. We note that the fiscal quarter results were available at the end of February, but the lay-offs did not take place until the middle of May. There is no mention of these lay-offs in the minutes of the two directors' meetings in April, even at the meeting where the fiscal quarter figures were discussed. In fact, the respon-

dent drew up a cost reduction plan in light of the quarterly figures which referred to the elimination of certain specified positions, without any mention of the kind of lay-off which took place on May 14th. Mr. Venema also told the Board that the respondent's business was seasonal, and it was clear that winter was a slow time of year. Both these facts tend to suggest that the winter first quarter results were somewhat less compelling than might have otherwise been the case. As it turned out, the respondent ultimately made a profit in that fiscal year.

44. There is also some inconsistency in the evidence with respect to declining sales. As noted earlier, Mr. Venema mentioned that sales dropped off dramatically the last week of April. Mr. Kuyvenhoven, on the other hand, told the Board that the respondent had its best month in April in terms of sales, and had a tremendous backlog, although he did refer to a drop in sales as well. Mr. Venema also agreed that there was a three and one-half month backlog at the end of March. Whether the backlog was tremendous or only three and one-half months, its existence tends to weaken the connection between the declining sales and the layoff several weeks later.

45. With respect to the overstaffing issue, Mr. McMillan testified that Mr. Crum had told him within the thirty days previous to the layoff that he was eleven people short, and that as a result, Mr. McMillan had hired a number of new employees. This is consistent with the seniority list entered into evidence by the respondent which indicates a number of new hires in April. In fact, eleven of the employees laid off on May 14th had been hired in April, five of them in the last week of April. Another nine had been hired in March. It was evident that one of Mr. Little's goals when he took over the Peterborough plant was to reduce inefficiency, and some of this discrepancy may be explained by the changeover in management. However, Mr. McMillan also testified that Mr. Little met with him within several days of the latter's arrival at the Peterborough plant on May 7th to review the respondent's figures with respect to staffing requirements. Mr. Little told Mr. McMillan that his department was "dead on" what it was supposed to be in terms of staffing, neither overstaffed nor understaffed, and that the same was true of the exteriors department, while the interiors department required more employees. The layoff less than a week later included seventeen employees who worked in Mr. McMillan's department.

46. The manner of the layoff adds to our concerns in this regard. There were three other layoffs described in the evidence, and in all of these, the respondent gave employees considerable advance notice in writing. In this instance, there was no notice whatsoever. In addition, the language used in the May 14th notices refers to terminations. Mr. Venema indicated that the layoffs were described in this manner because the respondent had no intention of recalling employees at the time. However, Mr. Dobie told the Board that notices of termination were given in disciplinary cases, and that where employees were laid off and the respondent did not expect them to be recalled, this event was referred to as an indefinite lay-off. This evidence is consistent with the other lay-off notices entered as exhibits. Moreover, the use of the word "termination" was not satisfactorily explained by the other evidence in this regard. In addition, we find it curious that so many employees were recalled within such a short period of time. As noted earlier, this is only partially explained by attrition. Rather, both this fact and Mr. Van Kooten's evidence with respect to the difficulty the respondent encountered in meeting delivery dates subsequent to the lay-off tend to undermine the respondent's assertions with respect to overstaffing.

47. Looking at the evidence as a whole, we are not satisfied that the reasons for the May 14th lay-off were entirely free of anti-union motives. As a result, we find that the respondent violated sections 65 and 67 of the *Labour Relations Act*.

48. We turn next to the allegation with respect to Ms. Snow. There was no doubt that Ms. Snow was the primary organizer for the union in this workplace, and that this fact was well known

throughout the Peterborough plant. However, there is a critical difference between the testimony of Mr. Little and Mr. McMillan with respect to the former's instructions in regard to monitoring Ms. Snow. Where their evidence conflicts, we prefer the evidence of Mr. McMillan. This is because Mr. McMillan was a supervisor at the time in question, and had no interest or connection with the union. Neither do we think that he had a particular interest in or grudge against the respondent. Although he resigned from the respondent shortly thereafter, and it was clear that he disagreed with the respondent's management style including that of Mr. Little, we do not find that this influenced his testimony on this point. In fact, it appears that one of the reasons he resigned was that he felt he was being asked to do things such as monitoring Ms. Snow where he was being set up as a "hatchet man". In addition, Mr. Little gave a number of rather indirect answers to crucial questions in this area. As a result, we accept Mr. McMillan's evidence with respect to Mr. Little's identification of Ms. Snow as a union organizer, and his instructions with respect to monitoring Ms. Snow. We also find that Ms. Snow was in fact subjected to a significant increase in supervisory monitoring.

49. The fact that Ms. Snow had been identified as a union organizer is also consistent with the warning letter given to her by the respondent directing her to cease collecting cards on company property. The letter itself refers to section 72 [formerly section 71] of the *Labour Relations Act*. However, section 72 does not *prohibit* the solicitation of cards during working hours. It simply states that nothing in the Act *authorizes* a person to do so. The issue before us is not whether Mr. Snow had a right to attempt to recruit employees during company time, but whether the respondent's letter to her constituted interference with the selection of a union or the representation of employees by a union contrary to section 65.

50. The Board has previously noted that the workplace is the most effective location for union activity to be carried out, and the most appropriate theatre for membership solicitation (*The Adams Mine, Cliffs of Canada Ltd.*, [1982] OLRB Rep. Dec. 1767). As a result, it adopted the following general principles in that case:

- (a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline;
- (b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, *in the absence of evidence that the rule was adopted for discriminatory purpose or applied unfairly*; and no-solicitation or no-distribution rules which prohibit union solicitation by non-employee union organizers at any time on the employer's property are valid in the absence of an application for a direction pursuant to section 11.

[emphasis added]

While this case involves union solicitation during working hours, it falls within the exceptions set out above in paragraph (b). Here there is ample evidence that the respondent's directive to Ms. Snow was unfair or discriminatory. The members of the worker committee, who opposed the union, had been provided with an extensive opportunity to persuade employees of their views during working hours. In contrast, Ms. Snow was prohibited from exercising similar rights on company time. In these circumstances, the respondent cannot take shelter under section 72 as justification for its conduct.

51. The respondent's explanation with respect to training another tile-setter would be quite plausible but for two critical facts: firstly, there was no explanation as to why after approximately a

year the respondent suddenly decided that it needed a back up tile-setter in the middle of an organizing campaign in which Ms. Snow had been identified as an organizer; secondly, there was no meaningful explanation for why Ms. Townsend was selected for the position, an explanation that was necessary because of Ms. Townsend's high profile in opposition to the union and the fact that the job would mean a promotion for her. In these circumstances, we are not satisfied that the respondent's decision to train Ms. Townsend as a tile-setter was not another attempt to put pressure on Ms. Snow, and to make her feel that there was some question with respect to her job security. The fact that the respondent eventually backed down on its plan helps to mitigate its conduct and affects our decision on the appropriate remedy. It does not, however, serve to purge the original decision of its improper motivation, nor to erase its effect.

52. Looking at the respondent's activities with respect to Ms. Snow as a whole, we find that the respondent violated sections 65 and 67 as a result of its conduct.

53. We note that the applicant indicated at a relatively early point in the proceedings that it was not claiming that Ms. Snow had been forced to resign as a result of the respondent's conduct, or that her resignation amounted to a constructive discharge. Rather, counsel indicated, the applicant accepted that Ms. Snow left of her own accord. However, on the last day of hearing, the applicant in its final argument advised that it was claiming damages for Ms. Snow of the kind awarded in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60. Counsel for the respondent objected, indicating that had he known such a claim was being made at an earlier point, he would have cross-examined and led evidence with respect to it. Having regard to the manner in which the pleadings were framed, the way the litigation progressed, counsel's previous assurances and the point at which this issue was raised, we are of the view that this claim was sufficiently novel that it should have been specifically and clearly identified at a much earlier stage of the proceedings. At the very least, it should not have been raised for the first time in final argument. As a result, the relief we directed for Ms. Snow on January 7th, 1992 was limited to any actual monetary losses she may have suffered as a result of the respondent's conduct prior to her resignation.

54. We turn next to the demotions of Mr. Crawford and Mr. Scriver. We are satisfied on the evidence that the restructuring which converted lead hands into leaders was not in itself tainted by illegal motives. However, we are more concerned about the fact that Mr. Crawford and Mr. Scriver were not offered jobs as leaders, but were given positions on the shop floor. The other lead hands who had their positions converted to leaders had their wage rates red-circled. Since Mr. Porter was off work on workers' compensation benefits, Mr. Crawford and Mr. Scriver were the only employees who actually experienced wage cuts as a result of this restructuring, and in each case those wage cuts were considerable.

55. The reasons given by the respondent as to why Mr. Crawford was not offered a leader position were somewhat vague. He had previously been not only a lead hand, but a line supervisor, and thus in charge of other lead hands. Mr. Little told the Board that Mr. Crawford did not have much respect from employees on the plant floor. However, under further examination, this turned out to mean that there were complaints about him by Mr. Van Kooten and Ms. Townsend. As noted earlier, both were opponents of the union and there is no dispute that it was well-known in the plant that Mr. Crawford was Ms. Snow's common-law husband. In the circumstances, Mr. Little must have known that there might be other factors involved in these complaints. Indeed, Mr. McMillan, who was Mr. Crawford's supervisor until shortly before the latter's demotion to the shop floor, indicated that he was skeptical of complaints from Mr. Van Kooten and another employee because they had "a bone to pick" with Mr. Crawford. Mr. Little also agreed that he

knew of no instance where an employee had refused to co-operate with Mr. Crawford or obey his orders.

56. Mr. Little appeared to blame Mr. Crawford for the lack of productivity in the plant during the time that Mr. Crawford was a line supervisor. Mr. Crawford had ceased to be a line supervisor before Mr. Little took over. However, even assuming, without finding, that Mr. Crawford played some role with respect to that problem independent of his instructions from his own superior, he had already been demoted from that position in February, and as a lead hand was only responsible for his own area. Mr. Little agreed that productivity in Mr. Crawford's area was no worse than any other area.

57. Another problem, according to Mr. Little, was that Mr. Crawford's salary had been maintained at the line supervisor level, and that he was earning too much money for the job he was performing. However, he agreed that the respondent had never considered simply reducing his salary, and this does not explain why he was not offered a leader position.

58. Mr. Little also indicated that Mr. Crawford did not do enough physical work. In contrast, Mr. McMillan testified to the effect that Mr. Crawford did the physical work necessary for the job, and had never refused or avoided it. Indeed, Mr. McMillan testified that Mr. Crawford had at one point volunteered for such work where another employee had been sick for several weeks. Mr. McMillan told the Board that he was only asked by Mr. Little whether Mr. Crawford was pulling his weight, and that Mr. McMillan replied that he was. Mr. Crawford was never spoken to before his demotion to the shop floor about any of these matters.

59. It is clear that Mr. Crawford was not happy about his demotion from the position of line supervisor to lead hand. In addition, Mr. McMillan had been simultaneously promoted, so that where once he had been supervised by Mr. Crawford, he was now Mr. Crawford's superior. In the circumstances, Mr. McMillan indicated that there was some resistance on Mr. Crawford's part. However, it was evident that Mr. McMillan also considered this to be a relatively minor problem.

60. With respect to Mr. Scriver, Mr. Little told the Board that he was not offered a leader position when lead hands were eliminated because he did not seem to be able to cope with organizing people to get the job done, he appeared confused, he had no respect from people under him and because productivity in his area was "awful". However, Mr. Walst, Mr. Scriver's supervisor, testified only that Mr. Scriver was quite green and that he himself had to go into his area more than once to direct employees to do tasks. He also indicated that Mr. Scriver had learned from this. As in Mr. Crawford's case, none of these criticisms had been brought to Mr. Scriver's attention previously. Indeed, Mr. Scriver testified that Mr. Walst had praised his work, and that when he received the memo demoting him which contained these comments, Mr. Walst told Mr. Scriver that that was not the way that it was and that he could not believe Mr. Scriver had received such a letter. Mr. Scriver testified that he had asked Mr. Walst for an evaluation, and that the latter told him that there was no need for one because he was doing a satisfactory job.

61. We also note that Mr. Little was not particularly candid about the circumstances of Mr. Scriver's demotion. Originally he testified that Mr. Scriver had resigned voluntarily from the lead hand position. Upon being confronted with a memo with Mr. Little's name on it dated July 4th which described Mr. Scriver as having been demoted, he suggested that perhaps he had not written the memo, and that it might have been doctored. Subsequently, he conceded that he had told Mr. Scriver that he was being demoted and that Mr. Scriver had chosen to resign instead. The other evidence indicates that after being informed that he was being demoted, Mr. Scriver had the worker committee take up his case, and an agreement was reached in which Mr. Scriver would describe himself as resigning in exchange for a lesser pay cut.

62. Mr. Scriver attended the union meeting on May 12th which Mr. Van Kooten attended as well. A day or two after the union meeting, Mr. Scriver told the Board that Mr. Walst confronted him and asked him whether he had been at the meeting, to which Mr. Scriver replied in the affirmative.

63. We do not doubt that neither Mr. Scriver nor Mr. Crawford were perfect employees. However, the evidence advanced by the company does not satisfactorily explain why they were not given leader jobs, which were, after all, positions of lesser responsibility than the jobs they had been performing. The timing and the singling out of these two employees also militates against the respondent's assertions. Looking at the evidence as a whole, we are not persuaded that the reasons for these demotions were entirely free of anti-union motivation. As a result, we find that the respondent has breached section 65 and section 67 of the *Labour Relations Act* in this regard as well.

64. We turn next to the allegation with respect to Reg Nelson. Having had the opportunity to observe Mr. Nelson's demeanour, we are prepared to believe that he is an opinionated employee who is free with his views and criticisms. In addition, we are not convinced that every discussion he had in this regard was initiated by other employees, as he appeared to suggest. On the other hand, the statements produced from other employees which were said to have in part prompted Mr. Nelson's discipline largely do not bear out the respondent's allegations against him. In addition, having regard to the evidence before us including two seniority lists showing Ms. Townsend's name in different positions without any explanation and Mr. Dobie's acknowledgement that there appeared to have been changes to Ms. Townsend's seniority date in her personnel file, it cannot be said that Mr. Nelson's criticisms were simply gratuitous trouble-making as Mr. Dobie appeared to suggest.

65. It was also clear that the complaints against Mr. Nelson were initiated by Ms. Townsend, and that she was primarily concerned with the fact that the credibility of the worker committee was being undermined by Mr. Nelson's criticisms with respect to the December layoffs, a concern Mr. Dobie apparently shared. We note that Mr. Nelson's comments did not take place in isolation, but in a context where the respondent was promoting the worker committee in a relatively unsubtle manner as an important vehicle for employees in the shadow of a union organizing campaign. In addition, members of the worker committee were publicly and vociferously opposing the union. As a result, discipline imposed because Mr. Nelson was undermining the credibility of the worker committee cannot be said to be a neutral event, unrelated to the applicant's organizing campaign. Mr. Nelson testified that he had become a union supporter prior to December, and that this fact was widely known. We have no difficulty in believing that almost any of Mr. Nelson's opinions would be widely known.

66. Moreover, the written statements of employees produced by the respondent indicate that Mr. Nelson was not the only employee discussing these matters. Mr. Dobie conceded that the respondent assumed that employees would talk about non-work matters during working hours, and that it was not necessarily an offence punishable by discipline. We do not find that the two day suspension meted out to Mr. Nelson in these circumstances can be adequately explained by Mr. Nelson's earlier discussion with Mr. Dobie. Looking at the evidence as whole, we are not satisfied that the reasons for Mr. Nelson's suspension were entirely free of anti-union animus. Consequently, the respondent breached section 67 and 65 of the *Labour Relations Act* to this extent as well.

67. We now turn to the worker committee meeting of May 2nd, 1990. There were a number of unusual features about this meeting. It was common both for management to introduce worker committee meetings, and for the meetings to be held on company time and premises. However,

meetings were usually scheduled at 4:00 p.m. to minimize the production time spent, as the work day ended at 4:30. In this manner, if the meeting became protracted it would extend on to non-company time. It was highly unusual for a meeting to start in the morning and run for approximately two hours. It was also the first time that the lead hands had attended a worker committee meeting.

68. In addition, the meeting was not held at the initiative of the worker committee. In fact, Mr. Van Kooten testified that the worker committee had not requested the meeting, but had only been informed of it approximately five minutes in advance. He agreed that the meeting had occurred because Mr. Baynton had called it. Looking at the evidence with respect to how the meeting came to take place, its length, the contact between members of the worker committee and supervisors during the meeting, the positioning of the supervisors and Mr. Crum and Mr. Baynton, and the other attempts by the respondent to promote the role of the worker committee both during meetings and in its written material, we find that it is a reasonable inference both that the respondent was actively involved in sponsoring and monitoring the meeting, and that at least to some extent, the worker committee was acting at the respondent's direction. In addition, it was clear that the function of the meeting, at least in part, was to identify union supporters. That this function was the respondent's initiative, and not just an independent excursion by the worker committee is supported by Ms. Snow's testimony with respect to Mr. Van Kooten's conversation with Mr. Beyers when his questions with respect to union supporters went unanswered, and by Mr. Beyers' conversation with Mr. Crosgrey in which he attempted to have the latter identify those collecting membership cards. Because Mr. Beyers did not testify, Mr. Crosgrey's evidence was uncontradicted in this regard.

69. We conclude as well that another purpose of the meeting was to embarrass and discredit Ms. Snow by handing out copies of the worker committee's earlier letter. Again, we find it difficult to believe that this was the action of the committee alone, given that it called for some advance preparation in terms of making copies of the letter available. Such preparation that would have been difficult for the worker committee which had only five minutes notice of the meeting. The effect of the meeting was clearly to discourage employees from associating themselves with the union, to identify and discredit Ms. Snow in this regard and to make it more difficult for her to approach employees and vice-versa. And indeed, Ms. Snow testified that this is in fact what happened, and that after May 2nd, employees no longer wish to be seen talking to her. To the extent that the actions of the worker committee at the meeting were sponsored by the respondent and were intended to discourage employees from associating themselves with the applicant, the respondent breached section 65 of the *Labour Relations Act*.

70. As noted earlier, there is a conflict in the evidence with respect to whether Mr. Van Kooten told employees there would be a wage freeze if the union came in, and that anybody who was signing cards would get what was coming to them. We do not find it necessary to resolve that conflict because even assuming, without finding, that those remarks were made, we are not convinced that they represented the respondent's views or were made at the instance of the respondent. Rather, having regard to Mr. Van Kooten's personality and demeanour before us and the specific nature of the respondent's reaction to the organizing campaign, we find it more consistent with the evidence that such statements, if they were made, were Mr. Van Kooten's own initiative. As a result, these allegations are dismissed.

71. With respect to the testimony in regard to subsequent meetings that day, we find that there were two meetings addressed by Mr. Kuyvenhoven. Although Mr. Kuyvenhoven suggested in his testimony that he was indifferent to the presence of the union, this sentiment is belied by his own memos, and the respondent's extensive activities in May, June and July including an unusual

number of meetings with employees within a short period of time, the various letters to employees, and so forth. It was quite apparent that Mr. Kuyvenhoven was in fact very disturbed about the organizing campaign, and we accept that on May 2nd, he told employees so at lunch time in a relatively spontaneous manner. Subsequently, there was a meeting in the afternoon in which Mr. Kuyvenhoven made much more temperate remarks which were prepared in advance. In our view, this meeting was both to announce the terminations of Mr. Baynton and Mr. Crum and also to attempt to repair the effect of his remarks at lunch time.

72. We do not find that Mr. Kuyvenhoven made references to the Wingham layoffs on May 2nd. It was evident that it was difficult for all witnesses to remember events which had taken place in some instances almost a year and a half before they testified. In addition, the series of meetings held by Mr. Kuyvenhoven within a short period of time meant that it was easy to confuse remarks made at one meeting with comments made at another. Having reviewed all the evidence, we are satisfied that Mr. Kuyvenhoven did refer to lay-offs in Wingham, but that he did so on June 6th, a point to which we will return later.

73. We accept that at the second meeting addressed by Mr. Kuyvenhoven on May 2nd, he indicated that he understood a third party had been invited in, and that if a third party could help with increased sales and improved production, it was welcomed to come in. However, this was clearly a rhetorical statement in the sense that Mr. Kuyvenhoven did not really believe that a third party could help with increased sales and improved production, and this was precisely the point that he was attempting to communicate. As a result, we do not think that this statement indicated to employees that the respondent was receptive to the applicant in a way that might mitigate the effect of Mr. Kuyvenhoven's other comments. We are also concerned that by his own admission, Mr. Kuyvenhoven referred to plant closings on May 2nd. When he was asked why he had done so, he testified that it was because he wanted to put a bit of realism on the table, and that he was hoping to give employees encouragement and security. Since references to plant closings are highly unlikely to make employees feel more secure, we find this evidence to be rather disingenuous.

74. There is no dispute that during the second meeting on May 14th, Mr. Kuyvenhoven made references to keeping the respondent's doors open and to the fact that if employees worked like a team, they would have a job all year. Similarly, on June 6th, we are satisfied that Mr. Kuyvenhoven did indicate to employees that there would be lay-offs in Wingham, and that he did make remarks which were interpreted by employees (and which he intended would be so interpreted) to suggest that they would be better off without the union from the point of view of layoffs. Again, Mr. Kuyvenhoven reiterated the importance of co-operation, that this was a matter of survival, and made references to various businesses going into the receivership or closing their doors.

75. In summary then, the meetings of May 2nd, May 14th and June 6th show a pattern in which the respondent associated "co-operation", "working like a team", and other code words in this context for non-unionization with job security. The effect of this was to suggest to employees that a lack of "co-operation" or "team work" might result in a lack of job security. While some of these references are oblique enough in isolation that they might not be as powerful, in combination and together with the May 14th lay-offs, we have no doubt that the message sent to employees was that unionization might well adversely affect their job security.

76. On June 6th, Mr. Kuyvenhoven's references to the possibility of the wage increase being moved up added a carrot to the stick that the possibility of layoffs represented. Although the wage scales contemplate advancing the August increase if productivity levels were in fact being met, Mr. Kuyvenhoven did not suggest in his evidence with respect to these comments that productivity levels were in fact being met, but only that things had improved. Ultimately, the wage

increase was not advanced. However, the suggestion that the wage increase could be moved up has a life of its own.

77. Reviewing the evidence in this area as a whole, we find that the respondent violated sections 65 and 71 of the *Labour Relations Act* by Mr. Kuyvenhoven's comments at the meetings of May 2nd, May 14th and June 6th.

78. The applicant also asserted that the introduction of the attendance bonus program at the Peterborough plant was a violation of the freeze provisions in the *Labour Relations Act*. While there are some differences between the program announced in 1989 and the program announced in 1990, the programs are roughly equivalent. For example, while the 1989 program required a longer qualifying period, it appears that its terms were less strict. The 1990 program had stiffer requirements in terms of absenteeism, but the qualifying period was shorter. In other words, the differences between the programs were relatively minor, and overall the 1990 scheme was neither richer nor poorer. In these circumstances, even if we assumed, without finding, that the changes in the program were a technical breach of section 81, we were not prepared to award a remedy, and as a result, the applicant's claim in this regard was dismissed.

79. As a result of our findings set out above, the first condition of section 8 has been established. We must now consider whether the respondent's violations have led to a situation where the true wishes of employees with respect to union representation are not likely to be ascertained. In this regard, we observe that the layoffs of Peterborough employees on May 14th, coupled with Mr. Kuyvenhoven's remarks at the meetings of May 2nd, May 14th and June 6th were likely to have convinced employees that union representation was a perilous venture. The respondent's actions go directly to the core of economic dependency which is the basis for an employee's vulnerability in the workplace. As the Board noted in *DI-AL Construction Limited*, [1983] OLRB Rep. Mar. 356:

A discharge is one of the most flagrant means by which an employer can hope to dissuade its employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made it clear to employees, the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of a discharge, I doubt that employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote. Accordingly, I am of the view that the applicant should be certified pursuant to the provisions of section 8 of the Act.

Indeed, the Board has found that discharges or layoffs have given rise to findings that employees wishes are not likely to be ascertained in a number of cases: See, for example, *Dylex Limited*, [1977] OLRB Rep. June 357; *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. Apr. 338; *The Globe and Mail*, [1982] OLRB Rep. Feb. 181; *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564; *Cambridge Canadian Foods Inc.*, [1987] OLRB Rep. Mar. 319; *Zest Furniture Industries Limited*, [1987] OLRB Rep. Feb. 299; *Zenith Wood Turners Inc. and 148620 Canada Inc.*, [1987] OLRB Rep. Nov. 1443.

80. With respect to the harassment of Ms. Snow, the Board commented in *K-Mart Canada Limited (Peterborough)*, *supra*, on the chilling effect management surveillance of union organizers has on employees' expression of their wishes:

Alternatively, even if an individual who is aware that another is under surveillance does not develop a personal antipathy to that person's activity, he may nevertheless disassociate himself

from the victim of surveillance of only to avoid the stigmatization that tends to attach to anyone who is knowingly being investigated.

Ms. Snow's experience after the meeting of May 2nd and during the period she was subjected to heightened supervision is consistent with those comments.

81. The May 14th layoff, Mr. Kuyvenhoven's remarks, the monitoring and discrediting of Ms. Snow, the demotion of Mr. Scriver and Mr. Crawford, and the suspension aimed at silencing Mr. Nelson's criticisms would all have a seriously distorting effect upon employees' opinions. The evidence before us indicated that the union campaign was met with initial enthusiasm by employees, but that shortly after May 2nd, interest in the union dropped off dramatically. This is confirmed by the dates of the membership evidence submitted. Almost forty cards were collected between April 30th and May 2nd. Thereafter, only three cards were collected. We find it highly unlikely that the sudden drop in interest is simply coincident with the commencement of the respondent's activities with respect to the campaign. In our view, the evidence is more consistent with a conclusion that the organizing drive was stopped in its tracks as a result of the respondent's violations.

82. Counsel for the respondent argued that the union campaign had lost momentum and had come to a halt as a result of the lack of interest of employees, rather than the respondent's actions. In addressing a similar argument in *K-Mart Canada Limited (Peterborough)*, *supra*, the Board noted that as a result of the employer's violations, it was not in a position to assess whether the union had already obtained all the support that it would have received in any event before the unfair labour practices began:

However, when the employer's very conduct has made that a virtually unanswerable question the Board is not inclined to give the employer the benefit of the doubt on that issue. Skepticism naturally attaches to the defence that the murder victim died of a heart attack seconds before the bullet struck him.

83. Nor do we think that the meeting addressed by union officials in the plant was capable of restoring to employees the ability to voluntarily express their wishes. In the first place, the respondent's violations were too compelling to be easily ameliorated. Secondly, few employees attended the meeting, not surprising in a context where interest in the union had already produced such adverse consequences. As a result, whatever message the union might have been able to deliver had little or no audience. Nor is this a case where the kinds of remedies provided for under section 91 might repair the damage done to the ability of employees to freely express their views on unionization.

84. We therefore find that the membership evidence submitted representing some forty per cent of employees is not an accurate gauge of their true wishes. In this case, however, the respondent also made a novel argument based on a somewhat unusual event. After the representation vote had been taken, the parties jointly requested that the Board unseal the ballot box and count the ballots. In an effort to avoid what turned out to be twenty-one days of hearing over a period of fifteen months, the Board granted the parties' request. The results of the vote are rather inconclusive because of a number of ballots that were segregated pending the resolution of disputes as to whether the individuals who cast them were entitled to vote. However, they do provide us with a rough estimate that between 26% and 32% of employees voted to have the applicant represent them.

85. Although the parties had agreed at the time of their request that the counting of the ballots would be "without prejudice" to the section 8 issue, it turned out that there was some misun-

derstanding as to what that term meant in this context. As a result, the Board permitted the respondent to make arguments with respect to the vote results.

86. The respondent then argued that the vote results, which were taken with the protection of the secrecy of the ballot box, represented the true wishes of employees, and that in any event the consistency between the percentage of membership evidence and the vote results indicated that the respondent's activities in the interim had had little or no effect. Otherwise, he argued, the slip-page in support would have been greater.

87. We cannot agree that the vote results are representative of employees' true wishes. For the reasons set out above, employees would have been voting not on whether they wish to be unionized, but on whether they wish to retain their jobs. The secrecy of the ballot box can only protect the identity of a particular employee's choice, and will not alleviate a concern that there will be general repercussions if the majority of employees choose union representation. As the Board observed in *Zenith Wood Turners Inc.*, *supra*:

At its best, the ballot box can only protect the identity of a particular employee's choice. Employees in this case would be justified in thinking that regardless of whether the employer knew how each of them had voted in particular, there might well be general repercussions with respect to job security if a union was certified. The respondents, through the layoffs, have shifted the focus for employees from the issue of collective bargaining to the issue of job security. A vote at this point means that employees are likely to be voting on whether they wish to keep their jobs, and not whether they wish to be represented by a union.

As a result of the respondent's violations in this case, the vote results are no more indicative of employees' views on unionization than the membership evidence.

88. Nor do we think that much can be made of the degree of differential between the membership evidence and the vote results. It is impossible for us to know at this point how much more membership evidence might have been collected if the organizing campaign had not come to a halt as a result of the respondent's violations. The application for certification was filed on June 25th and the terminal date, the last date by which membership evidence can be submitted was July 10th, 1990. At this point, all of the violations we have described above had already occurred. We do not think that much can be made of the fact that two weeks later when the vote was taken, there had not been a greater drop in union support. Given the numerous elements that might have been operating in this situation, we find that the differential between the membership evidence and the vote results is simply ambiguous, and of little assistance to us in making the determinations with which we are charged.

89. Turning now to the third branch of section 8, we also find that there is support for the union adequate for collective bargaining. The Board set out its general approach in this regard in *K-Mart Canada Limited (Peterborough)*, *supra*:

In approaching its discretion to grant certification under [section 8] of the Act, the Board must make some prognosis as to the future viability of bargaining. In so doing it does not necessarily view the membership strength which the applicant has on the date of certification as a static and immutable figure. Where the evidence establishes that a workplace has been subjected to the chilling effect of unfair labour practices that tend to suppress any expression of pro-union sentiment, it is not unreasonable to expect that the granting of a Board's certificate, with or without the assistance of other remedies under the *Labour Relations Act*, will in some degree restore the legitimacy of the trade union in the eyes of the employees. The Board therefore takes into account the potential for union support to grow among employees who beforehand might have been afraid to associate themselves with the union. With the granting of a certification, assuming that all unfair labour practices will end, there is little reason to doubt that the union's base of

support will grow and that more and more employees will come forward to participate in the endeavours of their bargaining agent.

In determining whether a union has support adequate for collective bargaining purposes within the meaning of [section 8] of the Act, the Board's concern is whether there is a number of employees, sufficiently representative of the employees in the bargaining unit, with the ability to negotiate with their employer on the content of a collective agreement. In this regard, bargaining ability is to be distinguished from bargaining power. The question is not whether they can amount a successful strike, or whether they will eventually realize substantial gains at the bargaining table. Rather, it is whether they have the core of support sufficient to negotiate with the employer. A [section 8] certificate, like any certificate, is only a beginning and need not be seen as anything more.

90. The Board has shied away from an approach in which numerical factors would be determinative of this issue. As the Board commented in *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848:

21. The issue of whether membership strength is adequate under section 8 has been found by the Board in prior cases not to be simply a question of numbers or percentages. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the Board stated at paragraph 22:

No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard to all the circumstances.

Some of the factors the Board has considered in this regard were also set out in *Manor Cleaners*, *supra*:

- (1) the stage of the union's campaign at which the employer conduct occurred (*Skyline Hotel Limited*, [1980] OLRB Rep. Dec. 1811; *District of Algoma Home for the Aged (Algoma Manor)*, [1979] OLRB Rep. Apr. 269);
- (2) the circumstances surrounding the cards signed prior to the employer interference and the number of cards signed (*Lorain Products*, [1977] OLRB Rep. Nov. 734);
- (3) the existence of a full-time unit which showed membership sufficient to support collective bargaining by its part-time counterpart (*Robin Hood Multifoods*, [1981] OLRB Rep. July 972; *Windsor Airline Limousine Limited*, [1981] OLRB Rep. Mar. 398);
- (4) the severity of the employer conduct insofar as it related to the number of cards signed - "the chilling effect" (*K-Mart*, [1981] OLRB Rep. Jan. 60);
- (5) the percentage of unit signing the cards where support for the union is at an extremely low level (5%) (*Sommerville Belkin*, [1980] OLRB Rep. May 796).

91. In light of how strongly the union campaign started, how early on the respondent's violations occurred, the severity and extensive nature of the respondent's conduct, the chilling effect of that and the percentage of support remaining, we found that there was a significant core of membership strength, and we were satisfied that a viable collective bargaining relationship could be established at this point. As a result, we issued a certificate to the applicant pursuant to section 8.

92. There are two further issues which we find analytically useful to address together at this point. The respondent argued that the applicant could not pursue relief on behalf of the Peterborough employees laid off on May 14, 1990 both because their names were not listed as grievors on the Form 58 initiating the section 91 complaint in this regard, and because the applicant did not

have written authorizations from them. Counsel cited *Cuddy Food Products Limited*, [1989] OLRB Rep. Feb. 126 in support of this proposition. In addition, the respondent argued with respect to the July and December layoffs of Wingham employees that not only were they properly motivated, but that in any event no relief could be granted with regard to them. The latter position was based on a memorandum of settlement signed by Local 3054 and dated September 24, 1991 which provides in part as follows:

3. The union agrees to withdraw any existing section 89 complaint on behalf of their members at Wingham, Ontario, Local 3054. Section 89 dated July 10, 1990 Local 3054 complaint is withdrawn. There will be no section 89 filed due to these 1991 negotiations.

93. As noted earlier, the section 91 complaint dated July 10th, 1990 which cites the July Wingham layoffs as a violation of the Act is brought by both the applicant, Local 27, and Local 3054. A letter which adds the December Wingham layoffs to the particulars also refers to both locals. Both the applicant and Local 3054 assert that the Wingham layoffs were at least in part motivated by a desire to demonstrate to Peterborough employees that unionization was associated with lessened job security.

94. At the outset of these hearings, counsel for the applicant indicated that he also represented Local 3054. When the memorandum of settlement was signed, counsel for the applicant indicated that Local 3054 had withdrawn from the proceedings as a result of the agreement contained therein. However, he argued that since the July 10th, 1990 complaint had been brought by both locals, and since the applicant and Local 3054 were separate legal entities, the applicant could not be bound by Local 3054's agreement. If the respondent had wished to preclude the claiming of relief under the complaint with respect to Wingham employees, in his view it was incumbent upon it to have arranged for the applicant to sign the memorandum of agreement as well.

95. Counsel for the respondent agreed that the applicant was not bound by the document, and that it could continue to pursue the issue of the Wingham layoffs as they affected Peterborough employees. However, the applicant could not, in his opinion, claim relief on behalf of Wingham employees represented by Local 3054 as a result of the memorandum of settlement.

96. Turning first to the respondent's arguments with respect to the naming of grievors and the lack of written authorizations, in our view they cannot succeed. The fact that the applicant did not name the Peterborough employees as grievors is not fatal to its claim for relief on their behalf. What is important here is that the Form 58 identify the events alleged to be violations of the Act and those remedies claimed with sufficient precision that the respondent has reasonable notice of the claims made in order that it may meet the case against it. As a result, whether or not individuals on whose behalf relief is requested are set out as grievors or referred to in other parts of the complaint is not determinative.

97. In this case, the applicant specifically cited the May 14th layoffs as violations of the Act and claimed relief on behalf of the affected employees. The date of the layoff and the number of employees were listed, and although the names of the laid off employees were not set out, this is obviously information that was within the knowledge of the respondent. As a result, the respondent has had sufficient notice of this claim to allow it to meet the case against it. *Cuddy Food Products, supra*, is readily distinguishable from these facts.

98. In any event, if we are wrong and it was necessary to list those employees by name as grievors, this is an instance to which section 116 [formerly section 114] of the Act applies. That section provides as follows:

116. No proceeding under this Act is invalid by reason of any defect of form or any technical irregularity and no proceeding shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

99. Neither do we think that it is necessary for the applicant to produce authorizations from the Peterborough employees for whom it claimed relief. This argument was based on *Cuddy Food Products, supra*, in which the Board said as follows:

15. Where a complainant names another as grievor, the Board is concerned that the complainant has the grievor's authority to represent his or her interests. Except where the complainant is a trade union with bargaining rights for a unit which includes the grievor, the existence of that authority will not be assumed: *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. Apr. 197.

100. In fact, in *Adbo Contracting, supra*, the Board was faced with an incorporated association which had not established status as a trade union. The Board ruled that since it had not established that it was "an organization of employees formed for purposes that include the regulation of relations between employees and employers", it had not established a sufficient interest in the matter to give it status as a complainant. The Board went on to say that this ruling stemmed from its concern that the mere filing of a complaint by the association did not establish that it was in fact acting on behalf of the individuals set out in the schedule attached to the application. The Board continued as follows:

Although this conclusion can be drawn where a complainant has established its status as a trade union, it cannot flow in the same manner from the filing of a complaint by an entity other than a trade union, where there is absent any evidence as to whether that entity actually represents those on whose behalf it purports to seek a remedy.

101. In other words, the Board did not say in *Adbo Contracting, supra*, that the existence of a complainant's authority will not be assumed unless it is a trade union with bargaining rights for a unit which includes those on whose behalf a remedy is claimed, but rather that such authority would not be assumed unless the complainant was a trade union.

102. In this case, the applicant has established trade union status before the Board previously, which pursuant to section 107 [formerly section 105] constitutes proof, in the absence of evidence to the contrary, of that status in this case as well. Where a trade union files a complaint under section 91 of the Act claiming relief with respect to certain individuals in regard to alleged violations during an organizing campaign, the Board's practice is to presume that the complainant has the authority of those individuals on whose behalf such claims are being made. The Board has never required unions in this situation to file authorizations from those individuals for two reasons. Firstly, there is such an obvious unity of interest between the union and individuals whom it is alleged have been treated in violation of the Act that the Board is content to presume authority in the absence of evidence to the contrary. Secondly, the union may well have an interest of its own in ensuring that individuals are not subjected to violations of the *Labour Relations Act* during an organizing campaign and obtaining redress for those who are, since this may dramatically affect the course of its organizing campaign. There is no reason to depart from the Board's usual practice in the case before us, and as a result, we are prepared to assume that the applicant has the authority to pursue claims on behalf of those laid off on May 14th from the Peterborough plant.

103. However, we are not prepared to extend this presumption to the claims on behalf of those employees in Wingham represented by Local 3054. In our view, the Board's usual presumption is rebutted where the employees in question are in fact currently represented by another union, and there is no issue with respect to that representation or other circumstances militating against such a conclusion. This is no doubt why Local 3054 joined in the second complaint with respect to the Wingham layoffs.

104. What, then, is the effect of Local 3054's withdrawal of the second complaint referring to the Wingham layoffs? We agree that Local 3054 cannot bind the applicant, and in fact it did not purport to do so. However, for the reasons set out, we are also of the view that the applicant does not represent the Wingham employees. This does not mean that the applicant cannot raise the issue of the Wingham layoffs as it affects Peterborough employees. It is clear that if the applicant is correct in its allegation that the Wingham layoffs were designed at least in part to deliver a message to Peterborough employees, the applicant has an interest of its own at least in regard to its claim under section 8, and perhaps with respect to some of its other claims as well.

105. On the other hand, allowing the applicant to claim relief on behalf of Wingham employees would render that portion of the memorandum of settlement set out above completely meaningless. While we accept that the respondent should have sought the applicant's signature if it had wished to be fully protected in these circumstances, the applicant's position amounts to allowing it to claim through the back door precisely what Local 3054 gave up through the front. While the two locals are separate legal entities, we would be ignoring labour relations reality not to find some unfairness in this result.

106. In our view, the appropriate balance can be struck in these circumstances by allowing the applicant to raise the issue of the Wingham layoffs with respect to Peterborough employees and any relief requested in that regard, but to preclude it from claiming relief on behalf of Wingham employees. This provides recognition to the applicant's own interest in this event but also gives some meaning to the memorandum of settlement.

107. As a result of this conclusion, however, we are not inclined to determine the issue of whether the Wingham layoffs were violations of the Act. We have made our findings with respect to all other matters the applicant has raised, including its claim under section 8, without the necessity of such a determination. In addition, in our initial decision we directed a comprehensive array of remedies, including relief for the laid off Peterborough employees and for others whom we found the respondent had discriminated against, together with more general directions with respect to the posting of notices. The only other remedy we would award if we found the Wingham layoffs were violations of the Act would be individual relief for Wingham employees, and that we are not prepared to do for the reasons set out above. As a result, this issue is essentially moot, and we decline to make a finding on it.

108. The parties were also in dispute with respect to the description of the appropriate bargaining unit. Having regard to all the circumstances of this particular case and the Board's general approach to bargaining units set out in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, we conclude that the stability of bargaining rights would be best served by the following description, which we find constitutes a unit of employees of the respondent appropriate for collective bargaining:

all employees of Royal Homes Limited in the County of Peterborough, save and except supervisors, persons above the rank of supervisor, truck drivers, construction site finishers, office and sales staff.

109. Finally, counsel for the applicant made an eloquent argument with respect to the applicant's request for its legal costs. He made it clear, however, that he was not suggesting that counsel for the respondent had obstructed or delayed the proceedings, and indeed, in our view, counsel for the respondent conducted his case with considerable professionalism. That being said, there is nothing to distinguish this case from those in which the Board's policy of not granting costs was developed, and we see no reason to depart from the Board's normal practice in this regard. (See *Repac Construction & Materials Ltd.*, [1976] OLRB Rep. Oct. 610). In addition, there was no evi-

dence that the applicant's organizing costs were any greater as a result of the respondent's violations than they would otherwise have been. As a result, we dismissed both those claims.

1346-90-R; 1347-90-R; 1617-90-U; 1830-90-U Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **Steinberg Inc. (Miracle Food Mart Division)** and The Great Atlantic and Pacific Company of Canada Limited, Respondents v. Retail, Wholesale and Department Store Union, AFL CIO CLC, and its Local 414, Intervener; R. Carniel et al, Complainants, v. Steinberg Inc. (Miracle Food Mart Division) and The Great Atlantic and Pacific Company of Canada Limited, Respondents; Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant v. Steinberg Inc. (Miracle Food Mart Division) and The Great Atlantic and Pacific Company of Canada Limited, Respondents

Evidence - Practice and Procedure - Sale of a Business - Witness - Board not persuaded that statutory duty under sub-section 64(13) satisfied through production by only one of the respondents of a witness to testify with respect to the allegation that a sale occurred - Second respondent directed to adduce, through *viva voce* testimony at the hearing, "all facts within their knowledge that are material to the allegation"

BEFORE: Susan Tacon, Vice-Chair, and Board Members G. O. Shamanski and R. R. Montague.

APPEARANCES: J. James Nyman and Robert McGibbon for the applicant in Board Files 1346-90-R and 1347-90-R; Paul Jarvis for Steinberg Inc., D. J. Shields and Tom Zakrzewski for The Great Atlantic and Pacific Company of Canada Limited; Susan Ballantyne and Robert McKay for the intervener in Board Files 1346-90-R and 1347-90-R; David Moore and Michael Battista for the complainants in Board File 1617-90-U.

DECISION OF THE BOARD; February 5, 1992

1. At the hearing on February 4, 1992, the Board reserved its ruling with respect to the motion of counsel for the individual employees (joined in by counsel for the Teamsters) seeking a direction from the Board that the respondent Steinberg produce a witness, in accordance with the obligation under section 64(13) [formerly section 63(13)] of the *Labour Relations Act*, to testify with respect to the allegation under section 64 of the Act. The Board indicated to the parties that it would endeavour, if possible, to issue its ruling on the motion in bottom line form by Thursday, February 6, 1992 so as to avoid cancellation of the hearing dates scheduled for February 10 and 11, 1992.

2. Having considered the submissions of the parties in the context of the jurisprudence, the Board is not persuaded by the argument of counsel for the respondent Steinberg (joined in by counsel for A&P) that the statutory duty under section 64(13) has been satisfied through the production, by only one of the respondents, namely A&P, of a witness or witnesses to testify with respect to the section 64 allegation that a sale of business has occurred. The Board hereby directs

the respondent Steinberg to adduce, through *viva voce* testimony at the hearing, "all facts within their knowledge that are material to the allegation".

0928-90-R; 1004-90-U International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Applicant v. **Thermogenics Inc.**, Respondent v. Group of Employees, Objectors; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Complainant v. Thermogenics Inc., Respondent

Certification - Petition - Unfair Labour Practice - Complaint in respect of certain layoffs, letters from the company to the employees and incident regarding employee wearing union pin allowed - Complaint in all other respects dismissed - Petition held not a reliable indication of voluntary change of heart - Certificate issuing

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *R. M. Sloan* and *D. A. Patterson*.

APPEARANCES: *Michael A. Church*, *Pierre Sadik*, *Edward Power* and *Alex Cassels* for the applicant/complainant; *Ross Dunsmore* and *Vince Johnston* for the respondent; *Wayne MacDonald*, *Dan Doyle* and *Don Chapman* for the objectors.

DECISION OF VICE-CHAIR K. G. O'NEIL; February 24, 1992

1. This is an application for certification and a related section 91 [formerly section 89] complaint, which were consolidated and heard together. The section 91 complaint begins with an allegation that July 5, 1990 layoffs were in retaliation for union activity and contains allegations reaching over the summer and fall of 1990. There were eighteen days of hearing before this panel over the course of which we heard the evidence of fifteen people and detailed argument. We have summarized the relevant facts below, noting relevant conflicts in the evidence and any necessary resolution of them.

Background Facts

2. The respondent Thermogenics Inc. (sometimes referred to in this decision as Thermogenics, the company or the employer) manufactures and refurbishes boilers. It is not a large operation, employing forty-six people shortly before the disputed July layoff. It has two major departments, Thermocoil, which builds boilers, and Railroad, which specializes in the rebuilding of boilers and parts for railroads. It also has departments which support the work of Thermocoil and Railroad, e.g., electrical and test bay. The company did very well in 1987 and 1988 but began to experience a decline in 1989 which continued into 1990. In 1989 the Thermocoil division built 39 boilers, and the railroad division rebuilt between 20 and 24. The comparable figures for 1990 were 16 and 6. As reasons for this decline, company witnesses mentioned a change in the Québec boiler code which resulted in a 75% drop in Québec sales between 1988 and 1989, free trade, and a change in the Ontario boiler code to accommodate Japanese manufacturers, as well as the general recession.

3. Various measures were taken by management to respond to the worsening business

conditions. In late 1989 a policy was established of eliminating overtime. In the Spring of 1990, it began to be more seriously enforced. Emergency overtime had to be approved by senior management whereas previously this had been within the foreman's authority. In March 1990, two employees were laid off in the Railroad Division and one from the Thermocoil Division. On March 22, 1990, the company asked all employees to use up their remaining vacation entitlements by taking time off, rather than being able to bank it and be paid for it, as had been the case until then. In 1990, as people left, they were not replaced, with the exception of an employee hired on June 18 to do part-time janitorial and driver work and certain recalls mentioned below.

4. In April the Human Resources Manager, Bill Jeanes, heard of the Work Sharing Program run by the Canada Employment & Immigration Commission (CEIC) and later attended an information seminar provided by them as he was interested in the program's potential implementation at the company. In late May, the company met with all its employees, explained the company's declining fortunes and asked them to participate in the Work Sharing Program, which would mean that each week, for the duration of the program, there would be four days of work paid by the company and one day paid at 60 percent by way of Unemployment Insurance benefits. David Cross, the General Manager, told the employees he hoped it would eliminate the need for future layoffs. The employees agreed to the plan.

5. Employees left the meeting with varying impressions. Shawn O'Connor thought no one was to be laid off; they would go to 3 days of work sharing instead of two if things got worse. Wayne MacDonald says that layoffs in the future were mentioned as a possibility in the discussion. Jeanes testified that at the time of the application, it was not the company's intention to lay off. In early June, the company applied for participation in the plan and was accepted shortly thereafter.

6. As part of the process for establishing the work sharing plan, participating employees were required to sign a form agreeing to enter into the Work Sharing Program and appointing representatives to be used as a liaison for questions about the program. Wayne MacDonald and Shawn O'Connor were the original representatives. Work sharing representatives were authorized by management to deal with questions from employees and to hold meetings with the employees about the program and their concerns about it. The Human Resources Manager testified that he had MacDonald "fully knowledgeable" so he could field questions from employees. The program was officially in place as of Sunday, June 17, with Friday, June 22 being the first "work sharing day", a day on which the participating employees did not work and received benefits from the Unemployment Insurance Commission.

The Union Campaign

7. Roy Watson and Alex Cassels, two employees in the Thermocoil division, met with union officials in mid-June to make the initial contact to start an organizing campaign. Watson then approached employees to sign cards. Membership cards in the applicant union were signed between June 26, 1990 and July 4, 1990; eleven of the twenty-two filed were signed on June 27. On July 4, 1990, the application for certification was filed with the Board. The evidence indicated that others besides Watson and Cassels who supported the union in discussions with employees included the other grievors, Kevin Wilson, Farzan Caliph and Shawn O'Connor. Cassels said that he, Watson, Wilson and Caliph were the main people involved. Cassels testified that the advice from the union had been to keep the organizing activity private from the company, which he tried to do. He thought the others had as well, although O'Connor testified that no one told him that they had spoken to professionals in the union or that they were to keep the union secret.

8. Wayne MacDonald, a Work Sharing Program representative, apprentice electrician, and later petitioner, said he had an idea who the key people were because Watson had asked him

to sign a card in June. He also testified union organizers were discussing the matter with employees in the plant. He thought Cassels was respected but he did not think he was "union". John Flanagan, an employee in Thermocoil, said that the campaign was very well known in late June and that he knew Watson was an organizer and suspected Cassels was as well.

9. O'Connor testified that by Wednesday, June 27, the whole shop knew about the union campaign. He knew that Watson, Cassels and Wilson were promoting the union. Between June 25 and 27, O'Connor had also spoken to employees at work about the union, both at break and other times. He estimated that by June 27, approximately 8 people knew he was in support of the union. People were wondering if there would be repercussions if management found out.

10. Wilson testified that he spoke freely to people at lunch about the union and somewhat in the shop. It was his view that Watson played the greatest role in bringing the union in. Caliph sat with Wilson at lunch and conducted an "open forum", in Wilson's words.

The Week Before the July 5 Layoffs

11. During the week following the start of the Work Sharing Program, which was also the week the majority of the union cards were signed, David Cross, the General Manager, was advised by the President of the company, Dave Kluey, that a major contract that it had expected to get had been awarded to a competitor. Some background about the contract is necessary to understand the role it played in this dispute.

12. A subsidiary of Canada Packers, Cangel, had formally invited bids for this contract in early June of 1990 from two companies, the respondent and a Japanese competitor. Cross had been informed by his Sales Manager that Thermogenics had the inside track on the contract, due to what it perceived as a technical edge because of the regulations then in effect. Noshir Mirza, the company's chief engineer, thought a "verbal okay" had been received from the Canada Packers engineer in late May or early June. Given the advice of his Sales Manager, Cross had authorized production of parts for the contract before it had been confirmed, in order to give the sales department an edge on delivery time, since the parts could be used for servicing other boilers if the contract did not come through.

13. The formal Thermogenics bid was received by Cangel on June 12. On June 15 a deal was struck with a Japanese competitor, before the Cangel negotiators had even reviewed Thermogenics' proposal, due to their view that the technology offered by the Japanese company was better for them. Cangel told Thermogenics sales personnel that they had not gotten the contract on June 18. The sales manager wrote a letter dated June 20 protesting the loss of the contract and promoting the Thermogenics' product in an apparent effort to get Cangel to reconsider. Cross heard orally they might be in trouble on the contract early in the week of June 25. On June 28 he found a note on his desk, dated June 27, from the company President, Kluey, which read in part:

Now that we are formally aware of our loss of the Canada Packers job of 4X300 BHP to MIURA, I would immediately suggest we consider the lay-off of additional shop people as we do not have sufficient work for them.

14. Cross testified that prior to receiving this note, he had been reasonably optimistic, expecting the Cangel contract and Québec sales within the next five to six weeks would provide enough work to mean no layoffs for two more months. Cross said the loss of the anticipated contract was viewed as the straw that broke the camel's back in terms of "how much longer we could keep going the way we were." The receipt of the note from Kluey meant to Cross that Kluey expected him to act quickly in response.

15. Cross said he had been informed by the plant foreman, Brian Somers, that Watson was "talking union" on June 25 or 26, a few days before he received the note from Kluey. At this point Cross was not aware there was an actual membership campaign or that the applicant was involved. Cross was of the view that if Watson was talking union, it was because he was unhappy about the resolution of an overtime problem that he had had a short time before this. Cross said he did not react greatly to the union news, as it was not the first time that he had heard such rumors, whereas Somers described his reaction as shocked. Cross told Somers not to mention the rumours to anyone else. Cross swears he had no knowledge of any names but Watson's in connection with union activity at the time of the layoff decision. He says he did not learn of Cassels' involvement until the start of these hearings before the Board and that he knew nothing about union activity on the part of the other grievors, Caliph, Dicks, O'Connor, Sanders or Wilson. Somers testified that at the beginning of the following week, on July 9 or 10, he mentioned to Cross 8 to 10 employees who were strong union supporters and said the grievors could have been among them.

16. Cross testified he spent June 28 discussing what to do about the loss of the Cangel contract with Kluey, the President, and confirming with the sales manager that there were no other immediate prospects for more work. Mirza, the Chief Engineer, was unavailable until July 3. Cross said he had made no final conclusion as to what to do until he talked to him the following week. Jeanes, the Human Resources Manager and James Casey, the foreman in the railroad department, left for vacation on June 28, without being informed that anything was afoot. At a social engagement that Friday, June 29, Cross discussed the situation with a guest with experience in personnel matters, who advised him to seek legal advice. On Tuesday, July 3, he spoke to senior counsel at the firm which he later retained and took advice as to what to do about the rumours of potential union organization in the plant, and the prospect of layoffs. As a result of the advice he decided to make what he considered to be the necessary business decision.

The July 5 layoffs

17. On July 3, Cross met with Mirza, the company engineer for about an hour and discussed inventory and prospects. In the last week of June, the company had \$250,000 in inventory, due to the fact that they had 3 complete boilers in stock as well as the coils stockpiled in anticipation of the Cangel contract, which Cross considered excessive. They decided to lay off Farzan Caliph, Alex Cassels, Glen Dicks, Paul Sanders, Roy Watson and Kevin Wilson. Neither Jeanes, the Human Resources Manager, nor the foremen in the affected areas, Somers and Casey, were involved in discussions leading up to the layoffs or the selection of the employees involved. This was due to Cross' intention, as a result of his legal advice, to insulate the layoff decision from the information about the union.

18. Cross ordered temporary layoffs because he thought more orders would be in-house in six or seven weeks. He did not want to spread the work out further so that there would be two days of work sharing time (an option that Jeanes had raised with him) for fear of losing the more skilled people. He was also of the view that fewer, more productive people are more efficient than a larger number of less productive people.

19. On July 4, Cross arranged for Jeanes to be brought back from vacation to implement the layoffs on July 5. Jeanes was told by Cross that the company needed him to come in because they wanted to make sure there was no problem with the Work Sharing Program and the layoffs. Jeanes says he called Sandy Earl, a UIC employee, to get permission to do the layoffs and was told there was no problem. Earl testified that she does not remember any such conversation and would have no authority to give the advice that Jeanes says she gave. She said that if an employer properly identified itself as on work sharing and looking for approval for layoffs, she would have

referred the call to Carl Gulliver, the consultant in charge of the application, in a different location.

20. Cross gave the names of those to be laid off to Jeanes. Each of them was given a letter by the foremen with the following content, which Jeanes had prepared, along with their final pay:

Due to a continued down turn in sales orders and in particular the recent loss of an anticipated order to our foreign competitor, it is necessary for additional lay-offs.

Effective 3:30 p.m. to-day, Thursday, July 5, 1990, you are being placed on temporary lay-off. In order to ease your financial situation, we have paid you in full up to this time.

21. The foremen were advised of the layoffs 1/2 hour before they were to happen, and were asked to hand out the envelopes to the affected employees and inform the employees they could speak to Jeanes in his office if they wished. All those laid-off who were at work at the end of the day went to Jeanes' office. Cassels' testimony about the discussion with Jeanes at the time of layoff was that they discussed why there were layoffs when they had just started work sharing, and then they talked about seniority. Jeanes mentioned the loss of a contract. Cassels said he asked if the layoff had anything to do with the talk of the union and that Jeanes responded, "You know where I sit on these things." Jeanes says the discussion was limited to his telling the employees the reason for the layoff was lack of work and an offer he made of continuing benefits during the layoff period. He said that no one asked him further questions and he did not remember the word union being mentioned. He later said it could not have been discussed because he was surprised to hear about the union on July 17 when he returned from vacation.

The Rationale for the Layoffs

22. The union alleges that the timing of these layoffs, or the selection of the individuals involved, was in response to its organizing drive - that those chosen were union supporters and perceived to be ring leaders by the company. Their union activity is said to be the reason they were laid off in preference to more junior, less skilled employees who were retained. The company maintains that the layoffs were precipitated by the recent loss of the Cangel contract and that the selection of individuals was for valid business reasons.

23. Mirza explained how the layoffs were done. He and Cross started with a review of inventory and the areas in which they were overstocked. They then went over the people involved in those sub-assemblies and decided what employees to let go. Specifically those who had been fabricating coils in anticipation of the Cangel contract were to be laid off. Cross said that Mirza chose the people to be laid off in Thermocoil and that he had not been told anything about union activity at that point. Further, Cross said the decision to stop coil manufacturing explained the layoff of the three pressure welders, Caliph, Watson and Wilson. Cassels was picked when they decided they also had too many other fabricated components in stock, i.e. combustion counters, coil retainers and doors. Then they went over all the names in all the departments. Cross, who was more familiar with railroad than Mirza, indicated that there was not enough work to keep railroad going on a regular basis either, and therefore, two people were laid off on the basis of seniority from that department. They felt there was enough work in other departments that other immediate lay-offs were not warranted.

24. Both Mirza and Cross swore that the matter of union activity was no part of these discussions. Mirza did not hear about the union until later. Cross testified that the union rumours were no part of the motivation for the layoffs or for the selection of the individuals involved, although he discussed the possibility that that charge might be levelled at the company with Kluey.

The Allegations of Irregularities Related to the Layoffs.

25. Part of the union's case was that the employer must have known that it was not supposed to lay people off during the Work Sharing Program without permission and that its failure to get permission from CEIC prior to effecting them is an indication of the abnormality of the process, an abnormality best explained by the presence of the union campaign. Jeanes maintains that he did get permission from Earl at the Newmarket office. The union's evidence did not establish that this did not happen as Earl simply does not remember if it happened and one can infer from her testimony that depending on how Jeanes framed his question, she does not deny some interaction might have occurred.

26. When Mr. Gulliver, the CEIC consultant, learned on July 17 that the company had effected several layoffs on July 5 without proper permission, i.e., from himself, he questioned whether Thermogenics should be allowed to continue in the program. The extent of the layoffs, together with recent quits, represented 20% of the work force, the same number of employees that participation in the program was to have saved from layoff. After speaking to Cross, he concluded that the company had not been intentionally trying to circumvent the program. He therefore recommended continuance to his superiors, who accepted that recommendation but, in doing so, formally drew the permission requirements to the company's attention on July 30.

27. The union also asserts that the recent implementation of the Work Sharing Program for the express purpose of avoiding layoffs makes the company's justification incredible. Further the company had the option to extend the days funded under the Work Sharing Program to two days. It is clear that the government sees work sharing as a program to avoid layoffs, that the company was trying to avoid layoffs by implementing it, and that the employees gave their consent to it in the hope that there would be no further layoffs. We accept that the company did not guarantee that there would be no more layoffs in exchange for the employees' agreement to enter into the program. However, Cross testified that he was optimistic himself until June 27 that there would be no summer layoffs and we conclude some employees' perception that implementation of the work sharing plan meant no more layoffs was a reasonable one.

28. One of the usual requirements of the Work Sharing Programs as administered by the Federal Government is that an employer identify the employees who would be laid off if the Work Sharing Program was not approved. Part of the reason for this requirement is that the Commission has criteria for admission to the program which relate to the percentage of the work force affected. For Thermogenics, 10 employees facing layoff without the program was the threshold for acceptance into the program. When the company submitted its application, the identification of individuals to be laid off was not done. However, there are now ten asterisks on the original documents which were apparently put there later on, possibly by an employee of the Unemployment Insurance Commission in conversation with the employer, according to evidence from CEIC employees. The asterisked names are different than those who were laid off and are not the people identified in evidence as most involved in the union organizing campaign, with the exception of Caliph.

29. Given the onus of proof, we are asked to draw a negative inference from the company's failure to explain the fact that the asterisks do not coincide with those who were laid off. The company's evidence was that it does not know how they got there and who provided that information and therefore it submitted no weight should be put on it. There is no obvious consistent pattern to the asterisks. They appear to be the most junior welders, pipefitters, stores men and labourer. However, in railroad, electrical and test bay, they are not the most junior people. We find the evidence on this point inconclusive, and not of the nature to warrant a negative inference, even given the reverse onus. The evidence does not warrant any particular inference more than another. It

raised various possibilities, only one of which, i.e. that the company had intended to layoff different people before the news of the union campaign than after, is necessarily negative to the company and relevant to the issues before us. Equally plausible on the evidence are other inferences: that a CEIC employee did them from other information on the file, or on some unknown basis, that a person with no authority at the company gave the information, or that the loss of the Cangel contract targeted different people for layoff than would have been the case absent that fact.

30. Other irregularities argued by the union to be significant are certain alterations to the names of the work sharing representatives on the application documents. Because O'Connor was out of the plant when the work sharing Agreement was to be signed, he was replaced by Cassels, who signed the work sharing application as an employee representative on June 4, 1990. After his layoff on July 5, 1990, he was in turn replaced by Mr. Tuck Chang. We are satisfied that these changes were not motivated by anti-union animus but were responses to availability of the personnel and the CEIC's need for new names on the forms. Some changes on the documents seem to have been out of inadvertence.

31. The union argues that in early June when the company applied for work sharing it could not have known about the Cangel contract and thus its loss should merely have returned the company to the position it was in when it entered the program, when further layoffs were not contemplated. The company's application for worksharing, as it now stands, indicates that 10 people would be laid off if it was accepted into the program. The evidence from Gulliver was that the number 10 was important to the Commission, that it was the minimum number that would have made the company eligible. There is no evidence that the company had done an exact calculation based on the amount of work it had. On the face of the document, it appears that the number put in this blank had once been different and had been later whited out, and replaced by the number 10, by whom it is not known. The evidence, as a whole, is more consistent with the conclusion that the company's entry into the work sharing program was just one more effort to halt a decline. It is not as consistent with a finding that it planned via work sharing to absorb the exact amount of people it had lost by the time of the layoffs and July quits, and that thus no reductions in staff were necessary. There had been verbal discussions, before both the formal bidding process and the implementation of worksharing, that had left the company very optimistic about getting the contract. This led to the stockpiling which was partly responsible for the excess inventory.

32. The union also points to other aspects of the layoff which it alleges were not in accord with normal business practices. It submitted a memo dated May 2, 1990 that refers to the employer's practice of giving notice in writing to each employee whose employment is to be terminated. The union says that the different method of doing the March layoffs, i.e. with one to two days notice and the option of pay or work periods of 1 week for 1 year or 2 weeks for 1-3 years service shows that the abrupt July layoff was meant to send a message to the employees about unionization. The employer responds to this by saying that the layoffs were done with no notice because they were to be temporary and were not intended as termination of the employees' employment, in contrast to the March lay-offs at which point recall was not contemplated.

33. Another unusual aspect of the July layoffs alleged to be indicative of anti-union motivation was that none of the foremen were consulted, nor was the Personnel Manager, as they had been in March and were in September, when further layoffs took place. Cross' reason for not involving either foreman in the layoffs was, as explained above, that he wanted to distance the layoffs from those managerial people who had knowledge of the union campaign. Somers said he was shocked and angry that Cross had not consulted him. He had never been given any prior indication that if layoffs occurred, it would be Cassels, Wilson, Watson and Caliph from his department. Somers said he asked Cross on July 5 why the grievors had been laid off, and whether it had any-

thing to do with the union. Cross' response was, "No, what makes you think that?" Cross said that he had been keeping Somers optimistic about the prospects for more work and that would explain any surprise shown by him.

34. The union sought to further attack the credibility of the need for the layoff on the basis that the company could have manufactured certain tanks which it had been buying from outside. Alex Cassels had suggested this to Cross, who had agreed to an experiment. A later costing showed to Cross' satisfaction that they were more expensive to do in-house than to buy. He also thought that fabricating the tanks in-house would not have created more than two weeks work for one person. In any event, Mirza, the Chief Engineer had opposed this idea from the beginning because the company would have needed x-ray and stress testing facilities, and thought that they could buy the tanks more cheaply than they could make them. Cassels did not think that the costing done was completely accurate and felt they could have been done on downtime, thus minimizing labour cost. His foreman, Somers, had said that they had done the tanks well within the time allowed. However, Cassels agreed that the source of the problem in getting acceptance of the idea was the engineering department's negative view of the viability of the project. Whether the company's view was right or wrong, there was nothing in this which appeared to be related to the union, and it was quite peripheral to the question of what work remained.

The Classification Issue

35. The company's rationale is based on a layoff by classification, using the criteria of skills needed and seniority. One of the union's attacks on this was their argument that the classifications were manipulated to justify the layoff of Cassels. The union produced a document called "Seniority Report", on which all employees are listed in order of seniority without mention of classification. Employees junior to the grievors on this list were retained after the July 5 layoff. The company explains this on the basis that the junior employees retained were not in the classifications in which the redundancies due to lack of work had occurred. In dealing with this question, we are faced with the fact that there had been no published classifications prior to this dispute. The company entered a document into evidence called "Job Classification by Seniority" which was prepared by the company some time after these hearings started. On it, two employees, Cassels and Persaud are listed under the classification "Layout/Cutting". Cassels was the more junior of the two. Appended to the application for the Work Sharing Program is a list of all the employees with their classifications indicated. This list was prepared before the organizing campaign or layoffs, as it was submitted with the application for work sharing program in early June. Thus it is not subject to the same argument of manipulation. Its classifications are also generally consistent with the classifications set out on the list of employees filed in the certification application. On the work sharing and certification lists, Cassels is listed as a layout fitter, while the other grievors from Thermocoil, as well as Persaud and Freeman, are listed as welders. As well, John Flanagan who was said by a number of witnesses to have been doing the same work as Cassels, is classified as welder on the work sharing and certification lists and fabrication welder on the later company list.

36. Cross rejected the union's suggestions to him in cross-examination that the classifications did not exist prior to the dispute, but maintained simply that he did not feel it necessary to publish classifications to the employees. There was also a considerable amount of transfer back and forth between departments and classifications as needed, so that an individual employee would not always be doing work in a single classification.

37. Somers, the relevant foreman, said that the classifications were generally welders and pipefitters. The welder classification could be broken into sub-categories of pressure welders, fabricator welders, and fabricator/layout without ticket. In his estimation Cassels and Flanagan

would be fabricator welders. Wilson and Watson were pressure welders, because they had “tickets”, being formal qualifications to do pressure welding. However, Somers said that when Cassels first transferred into his department, he was doing layout practically full-time as he was good at it, and they were busy. As time went on, there was not as much layout to be done, and by the spring of 1990 or so he was spending a major part of his time on fabrication.

38. Cassels said that in the last six months of his employment there was some reference to fabrication as a classification, although previously welder was the only classification he knew of. He had never heard of Layout/cutter as a classification before the hearings. Somers and Wilson testified that all fabricators did layout, although Somers clarified that prior to July 5, it was done by Cassels in particular.

39. If one makes a composite list of all the welders by seniority, thus removing the possibility of manipulation of classifications, the list would look like this:

Somers	June 8, 1983
Dykie	May 21, 1985
Persaud	Oct. 14, 1986
Cassels	Feb. 8, 1988
Milligan	June 8, 1988
Wilson	Jan. 11, 1989
Flanagan	Jan. 23, 1989
Watson	Feb. 13, 1989
Caliph	March 6, 1989

If one puts Cassels with the fabrication welders, a sub-list could be made:

Dykie	May 21, 1985
Cassels	Feb. 8, 1988
Flanagan	Jan. 23, 1989

40. Thus, Flanagan and Milligan are the welders junior to Cassels kept in preference to Cassels. Flanagan is also junior to Wilson. The evidence about Milligan was that he was one of the most senior pressure welders, and thus necessary to retain to leave enough pressure welders in the shop. The company’s preference to have welders qualified to do the pressure welding necessary in the manufacture of boilers is quite plausible on its face. There was no evidence to suggest it was unjustified. Flanagan is then the only person with similar qualifications doing similar work and junior to Cassels who was not laid off.

41. The union also challenges the disproportionate layoff in the welding group, which coincides with those most active in the union, and spares those who opposed the union. Somers said the reason no pipefitters were laid off while those fabricators were was that they had two boilers in the shop which still needed fitting for which the fabricating had been done. These boilers left the shop in a finished condition in August or September. Moreover, more welders could afford to be laid off than fitters because there were more welders to begin with. As well, welders traditionally stockpile, and in this case had been specifically stockpiling towards the anticipated Cangel contract. There were no layoffs of electricians, but there were resignations.

Bumping

42. The grievors all had skills other than welding and could have been used in other departments, had the company decided to do bumping into other classifications. There is no evidence that the company considered that option before the July 5 layoffs. The union alleges that the failure to transfer the grievors into railroad, service or labouring jobs instead of laying them off shows

discrimination. The company offered various reasons why certain grievors would not have been suitable in other classifications, which the union disputes. We do not propose to detail those, as we are not persuaded this option was considered at the time of the July layoff.

43. The union argues that Mr. Chapman, a pipefitter trainee, who was present during parts of the hearings in support of the petition in opposition to the certification, was not an exceptional employee and that he should not have been retained in preference to the union supporters who were laid off. The company says Chapman was retained because he was a good tuber in the Thermocoil division before the layoff and they needed a tuber. Also he was a lower paid worker and thus less costly to retain. Since the layoff Chapman has done tubing on whatever boilers have been done although there was not enough work after the layoff to keep him busy a hundred percent of the time on tubing. We have considered this as part of the bumping issue as there was no evidence that Chapman was identified to the company as an opponent of the union, or would reasonably be inferred to have been, prior to the July layoffs.

44. We are not prepared to find that the fact that the company did not bump people out of other classifications was indicative of anti-union animus. There was no obligation on the company to bump, and they did not consider it at the point of deciding on the July 5 layoffs. The evidence does not warrant any inference from these facts since there was no evidence of any previous practice to bump on layoff.

The Individuals Chosen for Layoff in Thermocoil

(a) Farzan Caliph

45. Farzan Caliph was involved in fabricating components and pressure welding. He had applied himself, had good evaluations and gotten "tickets". However, he was among those involved in making components for the lost contract. Mirza testified that since he was the most junior of the pressure welders, and there was not much pressure welding work to be done, he was laid off.

(b) Alex Cassels

46. Mirza explained that Cassels was good at layout and cutting, but had no pressure welding qualifications. He was also involved in fabricating components for the lost Cangel contract. The company had three people who could lay out who were being used for non-pressure welding: Chris Persaud, John Flanagan and Alex Cassels. Mirza testified that Somers had told him Flanagan was leaving shortly anyway and thus the choice was between Persaud and Cassels. Since Persaud had been there much longer and had pressure welding qualifications, he was chosen to stay. It was the company's preference to keep people who had trade qualifications for welding. It was not disputed that Cassels was not interested in pressure welding and had no pressure weldings qualifications.

47. Prior to his employment at Thermogenics, Cassels' had a diverse and meritorious work history, which it is unnecessary to detail here. At Thermogenics, he started in the railroad department and later moved to Thermocoil. In Thermocoil, he had done all the kinds of work available in the department, as needed, with the exception of tubing, pressure welding and electrical work. He received substantial wage increases and was promoted to a charge hand position for six months. The union asked the company witnesses why such a record did not save him from layoff. Although Cassels had heard of no problems with his charge hand responsibilities previously, company witnesses said they were not happy with his performance in his supervisory role. Mirza also testified that although he was a good worker when working by himself, Cassels had a short temper and that the company had received complaints about him from another worker and the railroad supervisor.

48. Flanagan, like Cassels, had worked as a welder and a fabricator but not a pressure welder since he never held a welding ticket. He worked full-time (except for work sharing) up to July 17 when he quit. Flanagan testified that he had not told anybody before July 12 that he was leaving, not having secured a job to go to until then. Flanagan said he had had no discussions with Somers, Casey, Mirza or Jeanes on this subject at all, and that he did not give notice. However, he said in cross-examination that at least for the month of July, and probably when work sharing started, he had put his mind to alternatives to Thermogenics, and that it was possible he had told others he was looking around for other work. The company maintains that if Flanagan had not said he was leaving, he would also have been laid off on July 5.

49. It was asserted by the union that Larry Freeman, a ticketed welder who was said to have left on July 17 like Flanagan, was retained improperly in preference to the more senior Cassels. The oral evidence about his departure was vague, but was to the effect that he had left before the layoffs. The documentary evidence shows a record of a weld done by him as late as May 30. There is also a notation that he is on vacation until July 3 on the work sharing list gathered in early June. The work sharing amendment sheet done on July 17 indicates him as a quit on June 17 on one sheet and July 17 on another. Other evidence indicated that some other references to June on that sheet were intended to be July. However, the list of employees agreed to by the union as of July 4 does not contain Freeman's name. Nor does it appear on the seniority list the union introduced into evidence. There is no evidence of his being at work at the time of the layoff decision. The evidence of the discussion preceding the layoff did not mention Freeman's name. We have concluded that Freeman was probably not an active employee at the time of the July 5 layoff, and therefore is not to be considered a junior employee kept on after the layoff in preference to Cassels.

50. A reasonable inference from the evidence about Freeman is that he had resigned prior to vacation and then finished his employment on vacation. If this is the case, it also bears a striking resemblance to Mirza's evidence about why *Flanagan* was not laid off. Firstly, he said he was not too sure of his last name. Secondly, he said that he had been informed that he had quit before he went on vacation, and that he would have been laid off as well if he had not thought he was leaving anyway.

51. It was part of the union's case in relation to Cassels that he had been an activist from the beginning of his employment and that this was part of the reason why he was selected for lay-off. For instance, in September of 1989 he sponsored a successful petition addressed to management to get a joint health and safety committee under section 8(5) of the *Occupational Health and Safety Act*. As well, part of Cassels' personnel file is a letter dated October 11, 1989 to Cross from Jeanes. It was written for the purpose of informing Cross of the extent of Cassels' dissatisfaction over his removal from chargehand duties and the dollar an hour that had gone with it. The union says that because this letter contains the statement that Cassels had mentioned that a collective agreement would force the company to continue such a dollar premium, that the company knew from that point onward that Cassels was a union supporter and that it is not just his participation in the organizing campaign that gave the company reason to fire him out of anti-union motivation. As well the letter concludes with the statement that Cassels could become more trouble than his skills are worth and the suggestion that if he became really obnoxious Cross could fire him for cause. Cross swore he had no memory of this letter in July, 1990 when the layoff decision was made.

52. Some consideration was given to returning Cassels to railroad in September, around the time of the second wave of layoffs, but Casey thought those he retained, and some he had laid off already, were better for the work he had left to do. Casey thought Cassels had only built pumps during his time in railroad, for which he had little need, and that his back disability limited his

capacity to lift. He was not aware Cassels had built barcos (steam connectors), a skill he did need. Since Cassels' layoff, fabricators and one pipefitter do cutting as necessary.

(c) Roy Watson

53. Mirza said Watson was laid off because he was involved in the manufacture of the coils that had been stockpiled for the Cangel contract and were no longer necessary. He also thought Watson was primarily involved in coil winding as Wilson's partner around the time of the layoff, and that this skill was not needed to the extent he should be kept on. Mirza said he did his work fairly well, and that it was a temporary layoff. In 1989 he had moved between welding and coil-winding and also went out on service. Wilson testified that at the time of the layoff Watson was welding, not coil winding.

54. After Watson's layoff he returned to the plant in July to pick up his tools. He met Somers, his foreman, and asked if his layoff was because of his union activity. Somers replied "I don't know, what do you think?" Watson smiled and said he would see Somers in a couple of weeks. The union offers this as evidence of anti-union animus. We find it equivocal and insufficient to warrant the inference suggested.

(d) Kevin Wilson

55. Mirza explained Wilson's layoff in much the same terms as Watson's, saying that he too did fairly good work, and was only temporarily laid off because he had been involved in the manufacture of parts that were no longer needed because of the loss of the Cangel contract. Wilson was recalled on September 15, 1990 when the company began building coils again because Mirza and Somers thought he was the best one for the work for which he was recalled. Since then, he has been coilwinding, fitting and fabricating.

56. Wilson thought he had a virtual monopoly on coilwinding because he was doing it "more than efficiently". Therefore his layoff was somewhat of a surprise since he thought the company always needed someone to do coilwinding. Also, shortly before the layoff, the company had asked him to get another pressure welding ticket and he had passed the test successfully. At the time of the layoff he was working on coilwinding with Milligan, not Watson as Mirza thought, and had two kinds of pressure welding tickets. He had also performed all the other jobs in Thermocoil except stick pressure welding.

Decision on the July 5 layoffs

57. The Board's jurisprudence is clear that the onus is on the employer to demonstrate two things, on the balance of probabilities: that the reasons given for the impugned activity are the only reasons, and that these reasons are not tainted by any anti-union motive: *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745. The process of deciding whether the Board is satisfied of these two things involves assessing all the evidence, including the credibility of the witnesses, and the extent to which the events accord with what is reasonably probable in all the circumstances.

58. The employer maintains that the July 5 layoffs and the choice of the individuals involved was entirely free of anti-union animus. There are several factors in the evidence which support that proposition. One is that the economic decline which the company had faced for months, and which the loss of the Cangel contract aggravated, was serious and unchallenged. That some contraction of the business was necessary after that loss was not seriously challenged, and to the extent that it was, we find the company's defense of the general proposition that the loss of the Cangel contract required some downsizing response quite persuasive. Secondly, the demeanour of

the decision makers, Cross and Mirza, in giving evidence was generally credible. The inconsistencies in their evidence will be dealt with below.

59. Thirdly, if one chose to do four layoffs in Thermocoil, as a response to the loss of the Cangel contract, the outcome based on the company's rationale is not substantially different from that which pertains if one does them by seniority (the union's preferred method) among those working on the stockpiled coils (if one accepts as we have that the decision not to bump does not necessarily imply anti-union animus). It leaves the question of the retention of Milligan and Flanagan in preference to Cassels, and/or Wilson. Milligan's retention was justified on the basis of his seniority as a ticketed welder, and this justification was not challenged. We will deal with the choice of Flanagan below. Caliph, Watson and Wilson are among the four most junior welders, however one looks at welder seniority. The rationale to choose those who were working on the parts rendered surplus by the loss of the Cangel contract was plausible. Seniority played a part, in that Cassels was chosen for layoff rather than Persaud, for example, because they did similar work and Persaud was more senior.

60. Further, the layoffs in railroad were on the basis of seniority and there is little evidence to link either Sanders or Dicks, the two individuals chosen, with the union. (Indeed, the union's case included the proposition that Dicks was recalled sooner than the others because he was less involved in the union than the other grievors.)

61. There are also several factors tending in the other direction - that the decision to lay-off these individuals was tainted by anti-union animus. First and foremost is timing. The direction to consider lay-offs was communicated by Kluey to Cross at the height of the card-signing campaign when the company had known about the adverse decision on the Cangel contract for over a week. Even if Kluey and Cross did not know of the loss soon after June 18, when the sales manager heard, Cross' testimony was clear that he and Kluey had discussed it early in the week of June 25 and he learned they were "in trouble" on the contract at that time. Yet he said he was still hopeful on July 27, before receiving Kluey's note, that there would be enough work to get them through the summer without layoffs. We have no information about what motivated Kluey to suggest lay-offs rather than some other response to the problem caused by the loss of the Cangel contract. The change in Cross' level of hope is coincident not only with Kluey's note but with the increasing union activity in the shop.

62. It is clear Cross heard of Watson's activity about the same time as Kluey sent him the note, but Cross puts the time that Somers informed him of Watson's talking union at June 25 or 26, somewhat earlier than Somers does. Somers puts his conversation with Cross as on the Friday, which would have been June 29, or the beginning of the following week - between the time of Kluey's note and the choice of the individuals to be laid off and the period in which Cross' hopes for a summer without layoffs evaporated. Another inconsistency in the evidence is that Somers said that Cross' reaction was shocked and that he was instructed to tell no one while Cross said that his reaction was neutral - that he had heard this kind of rumour before. Whether or not anything can be inferred from Somers' perception of Cross' reaction, it is clear that after Somers further informed him there was a full-fledged union campaign on, which was probably about July 9, the company's reaction was not neutral. Senior management called in the worksharing representatives to find out what the problem was, and had them offer the remaining employees alternatives for future layoffs, including two (extension of worksharing and extended vacation) which were not considered viable 5 days earlier for the impugned layoffs. They then attended meetings with the employees, after the letters which are discussed below were put out. The letters make it clear that the company hoped the employees would not unionize. A further inconsistency is that on direct examination, Cross swore he knew nothing of the union activity of the grievors other than Watson

until the hearings; on cross-examination he acknowledged Somers had given him eight or ten names of active individuals the week following the layoffs and that the other grievors could well have been among them.

63. Central to the company's case is that the decision on who to layoff was distanced from the information about union activity by the device of giving the decision making to someone who did not know about the union activity, namely Mirza. Thus the union was very much on Cross' mind at the time the layoff decisions were made. Cross' evidence was very clear that Mirza had chosen the individuals to layoff in Thermocoil. Mirza's evidence, although generally corroborative of Cross, differed in a significant way on this crucial point. He said that the decisions were joint, and that it was a process of discussion between him and Cross. When he was asked by union counsel whether Cross had suggested names to be laid off, he did not answer yes or no. Rather, he reiterated that they had looked at the names of employees and decided who to let go. This leaves the possibility that Cross structured the discussion in such a way as to ensure that at least some of the grievors were laid off.

64. Linked with the problem of whether the lay-off decision making was related to the news of union activity is the other major factor which tends to the conclusion that the decision making was at least tainted, i.e. the congruence between those picked in Thermocoil and the major actors in the union campaign. Even if the only name known to Cross was Watson's, it is at least a major coincidence that the people chosen included the major contact with the union, Watson, the man incorrectly thought to be his working partner, Wilson, and Cassels, someone known to be vocal and (we infer) a likely union supporter, as well as Caliph who was also active in promoting the union. There was uncontradicted evidence that the campaign was well-known in the shop prior to the layoffs, and that each of the four laid off in Thermocoil had been visible in one way or another in the campaign.

65. There was no attempt to link the layoffs in railroad to the loss of the Cangel contract. Why were layoffs beyond those implemented to deal with the parts made redundant by the loss of the Cangel contract necessary two weeks after the commencement of worksharing? The company says that things were not getting better there either. There was no attempt made to insulate this decision from Cross' knowledge of union activity.

66. The contrast in the method of the July layoffs to those done in March also tends to weaken the company's case. The March ones had been implemented with notice, and the full involvement of Jeanes and the foremen concerned. However, the company's explanation, that these were temporary, is plausible, and thus this is not a particularly weighty factor.

67. We have carefully weighed these competing considerations and have come to the conclusions explained below. The evidence that the company considered it necessary to reduce inventory after the loss of the Cangel contract was credible, and uncontradicted. The union's evidence corroborated the employer's expectations about the contract to some extent, as it was clear that Reisenfeld, one of Cangel's negotiators, had expected the Thermogenics bid to get more serious consideration than it did. We are persuaded, on the balance of probabilities, that some business downsizing or contraction as a result of the loss of the Cangel contract was justified for valid business reasons, and not contrived to chill the union campaign.

68. The manner of effecting the contraction is more difficult to deal with. Laying off people in the area doing the work is not unsound, absent some other contractual or other obligation or practice, of which there was no evidence. It is a method that had been used earlier, in March, albeit on a permanent rather than temporary basis. However, other methods had also been used before; work sharing had recently been implemented and could have been extended. There is

nothing illogical in Cross' view that fewer workers would be more efficient in the long run and that there was a risk of losing people who did not want to take the further cut in pay that a 3-day work week would have entailed. However, there is other evidence that renders this choice at this particular juncture not as straightforward as it otherwise might be. Jeanes' testimony was (shortly after saying he never pursued the possibility of extending worksharing with Cross) that Cross was well aware of the possibility of increasing hours on worksharing as a strategy to avoid layoffs, but that Cross had said that "it was necessary to lay certain individuals off." Although this statement is equivocal, and could mean simply that layoffs were the company's choice, or that Kluey had ordered layoffs, it could also mean that it was important to the company that specific people had to be laid off. Some were already on a three-day work week in railroad. More importantly, five days after the layoffs, the company offered all the remaining employees the opportunity to express their preference for the manner of future layoffs: Layoff by seniority, extension of worksharing, or extended (presumably unpaid) vacation. Although the company made it clear to MacDonald that they did not necessarily intend to be bound by the results of this poll, it certainly leaves the impression that these were all viable options for those remaining, in contrast to those who had just been laid off. The note communicating Kluey's decision that layoffs should be considered (and not mentioning any other options) was delivered at the height of the card-signing activity in the plant, although the loss of the contract had been known by sales for over a week, and Cross and Kluey had discussed it before the card signing had started.

69. The logic of concentrating on people who had been building the parts rendered surplus by the loss of the Cangel contract in the light of the lack of any obligation to bump is not at first blush problematic. The fact that all of the grievors had worked on those parts was not contradicted, although Mirza was apparently confused about who was doing what part of the coil process directly before the layoff. However, it is a singular fact that Mirza's mistake was about the one person whose name was known to be active for the union.

70. We have concluded that Mirza and Cross were also mistaken about Flanagan's departure having been announced. Flanagan's testimony remains basically uncontradicted that he had not told anyone he was leaving at the time the layoff decision was made. Given the possible confusion with Freeman, this is not necessarily anything but a simple mistake. Nonetheless, it is another mistake which assists the result of a layoff of an active union supporter. The company says that Flanagan would have been laid off as well if they hadn't thought he was leaving soon. However, the fact that he remained at work almost two more weeks is not consistent with the company's assertion that all these decisions were an urgently necessary scramble to cut costs and reduce inventory.

71. Turning to the layoffs in railroad, it is difficult to see how anti-union animus could be part of the motivation for the selection of the individuals laid off in that department, given the paucity of evidence of union activity on their part. However, the timing of the layoffs in railroad is very troublesome. There was no attempt made to explain the railroad layoffs by any particular event since the beginning of worksharing. Reference was initially made to cuts in VIA service "announced in and around that time". On cross-examination, Cross did not dispute that they were actually announced in October, 1989, and agreed they were for implementation in January, 1990, a date well before the March layoffs and the start of worksharing. The decision was justified generally on the basis that the railroad business was seasonal and that things were not getting better in railroad either. However, no attempt was made to explain what had changed between the implementation of worksharing and the layoffs which would explain why worksharing was not adequate to deal with the problem. As well, some were already on a three-day work week in railroad, and there was no explanation of why further extension of that phenomenon was not viable in a department where skills were apparently more interchangeable than in Thermocoil.

72. Thus we are left with a plausible case by the company that there were valid business reasons for the decisions taken, juxtaposed with a large number of factors, set out above, which detract from the proposition that they did not co-exist with anti-union animus. When we consider all of the evidence in light of the onus of proof, we find ourselves unpersuaded that the valid business reasons offered were untainted by anti-union animus as important inconsistencies in the company's case remain. It appears more probable than not that the manner of effecting the layoffs and the choice of the people to be laid off in Thermocoil as well as the timing of the layoffs in railroad were tainted by an attempt to discourage the ongoing unionization campaign. The union did not dispute that the additional layoffs in September were necessary. Given the worsening situation, we have concluded that the railroad layoffs would have taken place by September in any event, even without the unionization campaign, and that is reflected in the remedy set out below as well.

July 10-12, Meetings and Company Communications

73. The week following the layoffs was full of activity and conversation about the union organizing campaign and whether or not the layoffs were related to it, giving Somers reason to tell Cross that the layoffs were adding fuel to the union fire. Some employees thought Cassels would have been one of the last laid-off as he had earlier been a charge hand. Many employees were surprised at the layoffs and concerned about their meaning for the fortunes of the company, since work sharing had just begun.

74. On July 10, Cross, Kluey and the company's Controller, Harrison met with the employee work sharing representatives Chang and McDonald. By this time Somers knew of the extent of the union drive and had informed Cross. Management asked the two representatives if they thought that relations with employees had deteriorated and they answered that they thought more communication about the details of the business downturn would be appreciated. Cross said the management people said nothing about the company's position about the union, because they were being cautious. They told the employee representatives that the loss of the Canada Packers (Cangel) contract was a contributing factor to the layoffs.

75. Cross and Kluey also asked MacDonald and Chang, in their capacity as work sharing representatives, to present options to the employees concerning further layoffs: layoff by seniority, a three-day work week, or a two-month vacation. Later the same day the two employee representatives met with the employees to put the options to them. During the course of the meeting, MacDonald told the employees that he had spoken to Cross and Kluey. A discussion about the pros and cons of the options took place. Dan Doyle, a lead hand, testified that, in response to a question about what might happen after the union came in, MacDonald said "We're on work share now, what do you think will have to happen?" Doyle himself told the meeting that maybe the company would have to close its doors, and then added that he did not know what they would have to do. Flanagan recalls that either MacDonald or Doyle said that Kluey would probably close the plant if the union came in. A show of hands at the end of the meeting established that most people wanted layoffs by seniority. This result was conveyed back to Cross and Kluey through Somers.

76. Dan Doyle testified that the possibility of a petition's being circulated to oppose certification had been raised at this meeting in that he had said that there must be some way to rescind the cards. Later that day, an employee other than MacDonald approached Doyle and said that if Doyle would give "it" to him, (we infer referring to a petition to oppose the union) he would collect signatures.

77. On July 11, 1990 President Kluey arranged to have a memo posted which the union alleges amounted to improper interference with the rights of the union and a violation of the Act. The text of that memo is as follows:

In February 1988, the Ontario Liberal Government and specifically, the MINISTRY OF COMMERCIAL AND CONSUMERS RELATIONS, headed by Mr. Bill Wrye - Minister of M.C.C.R., after being heavily lobbied by the MIURA BOILER CO. OF JAPAN, arbitrarily changed the "boiler regulations" in Ontario to accommodate the MIURA boiler as a "coiled boiler design".

Miura Boiler Co. implied to many of the Provincial and local Brantford politicians that if the regulation was changed, Miura would then build a manufacturing plant in Brantford (assisted by government grants) which could employ up to 200 Canadian workers within three (3) years.

Thirty months have now passed, MIURA has constructed a plant using many robotics and automatic equipment.

MIURA does not manufacture a coiled boiler nor have they employed many Canadian workers.

A recent source of information indicated MIURA currently employees approximately a total of 35 persons of which less than 12 are Canadian.

The MIURA boiler is a vertical straight tube boiler, simple in concept and cheap to build versus a coiled boiler such as the THERMOCOIL.

MIURA have taken a number of boiler projects from our company over the past 30 months on lower price.

The cost of borrowing money in Japan is approximately 3.5% versus 15% in Canada.

The management of THERMOGENICS have continued, over the past 30 months, to attempt to have this regulation rescinded or changed. We have kept our local M.P.P., Mr. Charles Beer, constantly aware of our situation, but to little avail.

There is currently, in the fourth draft stage, a "potential change in the regulations", which if passed by the government, will reclassify the MIURA boiler from a "coiled tube type" to a new category, "low volume boiler" and in addition, limit this type of boiler installation to 200 H.P. with a maximum installation of 3 X 200 H.P.

Should this regulation change occur in its present wording (hopefully by the end of 1990), we will at least attempt to maintain our larger sized boilers above 200 H.P. in the Ontario market.

Thermogenics is certainly prepared to consider the design and engineering of a similar straight tube boiler, however, until the regulation change is in force, we are not prepared to expend the research and development costs involved.

As you can see, with

- high interest costs,
- free trade,
- Boiler Regulation change,
- off shore, unfair competition,
- MEECH LAKE issue,

and currently the pending G.S.T. implementation, we have incurred a down trend in companies purchasing coiled boilers.

For over 30 months we have pleaded, begged, written and had news releases and threatened this government to change this 1988 regulations as being unfair.

Should the employees of this company wish to direct individual personal letters to any of the politicians involved, we will be happy to supply the correct mailing address of those involved.

Should you wish the company to prepare a letter on your behalf and signed by your representatives, please prepare this letter and give to my attention for typing and proof reading.

We are concerned as you over future loss of jobs and will endeavour to bring this situation to a conclusion at the earliest possible point in time.

I will await any directions from your shop representatives.

78. The same allegation is made in reference to a letter issued on the same date by Kluey, and distributed with employees' paycheques the following day, July 12. It reads as follows:

It has come to my attention that a union is being considered by some employees. A few of you have asked management questions about unionization. There are a number of things each of you may wish to consider. You should know that the decision to unionize or not to do so is yours to make, not ours. The law prohibits anyone from coercing or pressuring you in any way with respect to this very serious question. Therefore, although we are very interested in this matter, we do not intend to interfere in your free decision-making. Similarly, we presume that no union supporter will pressure you either.

Unionizing is a serious step. It changes the basis upon which employee relations are conducted at companies, because you give up your rights to deal with us as individuals. Instead, the union takes over as your agent. They decide what is best for you and they talk to management. The individual relationship is substantially reduced.

Of course, being a union member involves significant responsibilities. They all have thick constitutions which govern members working lives. For example, you can be charged, tried and convicted for conduct unbecoming a member. You can be fined by the union or removed from employment if you work in a union shop company. Therefore, every person should review the union constitution and know its rules and regulations and bylaws.

In fact, if a union really is interested in you, they would certainly show you their documents before you even signed up. Someone acting in your best interests would want you to see the fine print first before you committed yourself.

With respect to signing up, employees are often told that it is for the purpose of getting a free vote. Not so. In Ontario, if more than 55% of those in the proper bargaining group sign, then certification is automatic. No choice. And with certification, a union can insist that all employees be required in the collective agreement to pay the equivalent of union dues. No one will avoid paying.

So you may ask why they want your money? Is it to keep them in business - or you? No union can stop a downturn in the economy. I explained some of that to you in yesterday's memo. No union can stop aggressive competition. No union can stop layoffs.

Unions can promise a lot, but what will they bring you in return for your dues payments. Our company is already a very good place to work. Our rates are competitive, our benefits are fine. We don't face the labour relations problems some of our competitors do.

If there are problems with labour laws, the employment standard branch, the human rights commission, the occupational health and safety people and the worker's compensation representatives already represent employee interests. And I like to think we do too.

So when you are considering whether or not you really need a union to deal with us, ask yourself whether they are doing this for you or just for them.

I already think this is a pretty nice place to work, but the final decision is yours.

Cross said the memo was in response to the request of the work sharing representatives on July 10 and that the letter was drafted by counsel.

79. On July 12, apparently after the letters from Kluey were distributed, there were two meetings of employees. The first was described by Somers as a meeting about the union, which he

allowed to go on for 15 to 20 minutes “to get it all out of their system”. Somers set it up, then walked away and afterwards asked the men to forget about it and go back to work. MacDonald spoke, saying they would have to pay money out of their own pockets to the union. He also mentioned that licensed union trades people might take the jobs of people without such qualifications.

80. The second meeting was later the same day with Cross and Kluey. People wanted to discuss the union with them, so Somers approached Cross to request it. All the employees were told it was not mandatory to go, they were paid until quitting time whether they came or not, and they could go home early if they did not want to go. Cross consulted counsel before the meeting. The tough economic times were discussed, but neither the company’s financial position itself nor the company’s position on the union formed part of the discussion.

81. Doyle and MacDonald went to the second meeting wanting to ask Cross and Kluey how to stop the union, but the meeting took another turn, dealing with the economic downturn instead. Doyle asked the question, “How will we know if we’re certified?”, to which Cross replied that the form would be posted. This was the last work day before the green sheets were posted on July 16, since Friday, July 13 was a work sharing day.

82. The union also alleged that the company’s posting of certain newspaper clippings relating to the recession and bankruptcies were further in violation of the Act and not a *bona fide* exercise of free speech on behalf of the employer. Articles about bankruptcies were posted by the company for approximately two to three weeks in response to the request of the employees’ representative on July 10 for better communication from the company. Much of the same information had been out to the plant in clippings from time to time over the past two years.

Decision on Company Communications

83. Under section 65 [formerly section 64] of the Act the employer’s right to free speech is protected as long as its communications do not amount to coercion, intimidation, threats, promises or undue influence as the employer is prohibited from interfering in the formation or selection of a trade union. Do these communications cross the line?

84. As the Board has noted in many cases, a mere expression of preference to remain non-union will not violate section 65 of the Act, but any suggestion that unionization will be accompanied by loss of jobs will. See, among others, *Cambridge Canadian Foods Inc.*, [1987] OLRB Rep. March 319; *Rainscreen Metal Systems Incorporated*, [1989] OLRB Rep. May 482; and *Vogue Brassière*, [1983] OLRB Rep. Oct. 1737, and the cases cited therein. In *Cambridge Canadian*, it was found that a letter implying that a previous commitment to employees in the area of job security might not hold if the employees chose to be unionized and that the result of unionization might be diminished job security as a result of loss of business violated the Act. In dealing with the employer’s argument that the message was simply factual and not a threat, the Board referred to the following passage from *Seven Up/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87.

.... In assessing employer conduct the Board is obliged to take into account the responsive nature of the relationship of employees with their employer. Predictions of what the future holds may constitute threats or promises, if it is in the power of the employer to make the predictions come true and the employees perceive in their employer a willingness to exercise that power in response to the success or failure of their attempt at unionization.

The above cases make it clear that the Board will evaluate letters, including skillfully drafted ones, in light of the entire context. In *Seven Up/Pure Spring Ottawa*, the Board observed at paragraph 28 that the document must be assessed as a whole from the point of view of the typical employee

receiving it and that the Board is obliged to determine the interpretation most likely to be placed on it in all the circumstances by the employees in question.

85. The first memo set out above, dealing with the competition faced by the employer, has certain features which deserve careful scrutiny in the context of section 65. It expresses direct concern over future loss of jobs in the middle of the certification campaign and makes reference to the apparently new use of the employees' representatives to sign letters lobbying for the company as a strategy to stop future job loss at a time when the employees were considering another kind of representation. See *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189. The memo came the day after the meeting in which the employees were asked to say what kind of layoff procedure they wanted for future layoffs and 6 days after the unexpected layoffs in the Thermocoil and railroad divisions. However, the role of the work sharing representatives and any change in the company's dealings with them was not addressed by the parties. We have concluded that this memo, by itself, would not violate the Act. It does not address the issue of the union and does not cross the line of employer free speech into undue influence.

86. However, the memo must be analyzed together with the second communication, the letter, since the latter explicitly refers the reader to the earlier memo by the line, "I explained some of that to you in yesterday's memo" in the sixth paragraph. We have concluded that the average employee would not have missed the suggestion being made by the two letters together that unionization would lead to adverse effects on their job security. The most crucial factor is that whether or not the employees are kept "in business" is linked directly to the union and its probable collection of dues. This is followed in the next paragraph with the statement that, "We don't face the labour relations problems some of our competitors do". In context, we have no doubt this was intended to be a reference to unionized competition. There is no doubt that the letter is anti-union, which in itself is not improper. It is also anti-union in a manner that could only be designed to scare employees off unionization, rather than persuade them it was not a good idea. For example, it stresses the possibility of trial, conviction, and fine for conduct unbecoming a member. A possibility, yes, but a very remote one in the Board's experience. This is the non-neutral context in which all the other statements in the letter and the memo it incorporates by reference must be read.

87. As well, the issue of layoffs was particularly sensitive both because of the layoffs the week before and the meeting scheduled the day before where the employees "voted" on their preference for the method of future layoffs. Some of the predicted adverse consequences linked with unionization in these letters are ones over which the employer would have no control, such as a downturn in the economy and aggressive competition. But its response to those factors, including layoffs and whether or not the employees "remain in business" are things over which the employer has and would be perceived to have substantial control. Although the point that collective bargaining is no guarantee of invulnerability from the vagaries of the economy is an unobjectionable point, this letter goes further. There is no direct threat in the letters, and they are subtly worded; nonetheless, the two letters in rapid succession, together with recent events, clearly delivered the message that the union and its potential consequent labour relations problems were linked to future job insecurity. This, we find, crosses the impermissible line into undue influence. We are well aware that the company's fortunes had declined, and might continue to do so, with or without the union. That very fact made the whole area of job security even more sensitive than it normally is. It is always highly sensitive. An employer mixes it with its anti-union communications at its peril, as the reported cases have shown.

88. In assessing the impact of these letters, we have considered Cross' testimony that they were written in response to the request for more information made by the work sharing representa-

tives. This does not change the message delivered, even if the request had come independently from the employees. When it comes as a result of a meeting organized by management and in response to questions raised by them, this factor assists the respondent even less. We find the letters, in the circumstances of this case, to be in violation of section 65. It is unnecessary to decide if they are also violations of section 67 [formerly section 66] and 71 [formerly section 70] as alleged, as we are of the view that in the circumstances of this case, no remedy beyond that set out below would flow, even if the communications were also in breach of the other sections pleaded.

89. Turning to the meeting of July 12, we have concluded that it was not a “captive audience” meeting in the usual sense of the term and that the statements made at that meeting did not link the union to future job insecurity as the letters did. Reiterating the company’s concerns about the economy likely underlined the linkage made in the letter hours before and may therefore be seen as part of the same sequence. However, we are not of the view that it warrants a finding of a further violation of the Act. We are of the same view regarding the clippings, particularly as the evidence that similar clippings had appeared from time to time for at least the last year was not contradicted.

90. In argument, company counsel made reference to the singular absence of any evidence from employees of any impact of the layoffs, meetings, letters, or conduct of the petitioners may have had on them. The Board has commented on a number of occasions that such evidence, when called, is of little assistance. See among others, *Cambridge Canadian Foods Inc.*, *supra*, and *Zest Furniture Industries*, [1987] OLRB Rep. Feb. 299, and the cases cited therein. In any event we found the probable impact of the above facts sufficiently apparent from the evidence before us. We find no basis for the adverse inference we were invited to draw from the union’s failure to call such evidence.

The Petition

91. On Monday, July 16, the green sheets were posted giving notice of the application for certification. On Tuesday, July 17, Wayne MacDonald, an apprentice electrician, circulated a petition in opposition to the certification. Both MacDonald and Dan Doyle, who assisted MacDonald in the petition process, had asked members of management before July 17 what could be done to stop the union. These members of management had given both employees the response that they could not talk about it.

92. On July 17th MacDonald wrote the heading on the petition in the electrical room; it took about two hours of company time to get the wording on the petition the way he wanted it to be. It reads as follows:

We the undersigned, employees of Thermogenics Inc. oppose the application of Certification of the trade union of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

At approximately 10:00 a.m., MacDonald took the document onto the shop floor to get signatures. He was not concerned about circulating the petition on company time. He said this was because he assumed he had the same rights as the union to solicit support on company time. Although he had not seen anyone sign for the union on company time, he had seen people approached by the union on company time.

93. MacDonald said he understood from reading the green sheets that the only signatures that counted were from people who had signed union cards. Doyle testified that one of the petitioners knew who had signed union cards and who had not, and that MacDonald had told him this

before he started getting the signatures. MacDonald testified he did not know who had signed union cards and who had not, and therefore asked each employee at his work station whether or not he had signed. If the answer was no, he did not ask for a signature on the petition. To those who said they had signed a card he said words to the effect that if they wanted to change their mind that was the time to do it. There was little discussion except questions on how much help a petition might be. He told them that if he got more than fifty per cent of the names he could possibly stop the union. He said some told him they would sign because they had seen others signing. He had a hard time understanding one employee the first time around and sought him out about 5 minutes later at which point the individual agreed to sign. He asked people to put their punch clock numbers, their signatures and their printed names on the petition. All the signatures were obtained in the space of one half hour. His estimates of how many people he had spoken to in that time varied from 18 on direct examination to 30 on cross-examination. He had not told people in advance of circulating the petition that he intended to do so.

94. Flanagan testified that MacDonald approached him the day before he left the company and said if the petition did not go through probably everyone would be looking for another job and that Flanagan might as well sign since it did not matter anymore because he was leaving. MacDonald denies saying that he told Flanagan to sign because he could be out of a job or anything about layoffs. He also denied the union's suggestion that he told people the company would close.

95. MacDonald's circulation of the petition came to a halt when the plant foreman Somers stopped him. MacDonald had no idea that Somers knew what he was doing until this point. Somers was responsible for supervising everyone on the floor that day, since the other foremen were absent. Somers testified that he saw MacDonald walking along with a paper and asked him what he was doing. MacDonald said it was personal; he was gathering information, and asked if he could leave the shop. Somers told him he could not collect names, but he could leave the shop. About 30 seconds later, Somers received a request from Doyle to leave for personal reasons. Doyle and MacDonald were at the back of the shop together at the same time. Although it is a breach of company rules to leave without permission, we are satisfied that the two men had permission to leave, and thus do not find that the union's allegation that they were allowed to leave the premises without permission has merit.

96. A list of addresses accompanied the petition filed with the Board. MacDonald took one-half of the addresses from a list obtained from Bill Jeanes, the Human Resources Manager, and obtained the other half by the method of going back to the employees after the list was retrieved by Jeanes, who had realized it was inadvisable to have given out the list. MacDonald gave no information to Jeanes about who had signed. Doyle said that it was his idea to get the list since he had had similar lists as a lead hand and for social occasions such as bowling. The evidence from MacDonald, Jeanes and Doyle about exactly how MacDonald got the list and who asked for it was conflicting. Doyle and MacDonald both said that the list was obtained before all the signatures were signed. However, in cross-examination, MacDonald said he had told some people that he had addresses from Jeanes before they signed. If the sequence he otherwise testified to is correct, this would be impossible. However, we are, in retrospect, not sure MacDonald understood the question put to him, and thus put no weight on this point. Given our findings below, it is unnecessary to resolve the other conflicts in this portion of the evidence, or to decide whether the giving of the list amounted to assistance or involvement by the company in the petition.

97. Although MacDonald said in direct examination that he had no help from anyone regarding the preparation of the petition, he did show it to Doyle before he circulated it, and it is clear that he at some point arranged with Doyle to get a ride to the Board to file it. Doyle is the pipefitters' lead hand, and acknowledged he would be seen as Somers' right hand man, but does

not see himself as a foreman. He takes over when Somers is away, and is a friend of Somers both inside and outside of the plant.

98. The only copy made of the petition was made at the Board. MacDonald did not show the petition to anyone but those who signed it. After delivering the petition to the Board, MacDonald punched back in about 3:05 p.m. and did not speak to anyone about his absence. Doyle went back to the plant and offered the foreman Somers a ride home. Somers asked him where he had been and Doyle told him. Somers said he could not talk about it.

99. The Board has considered the issue of the voluntariness of petitions in a very large number of cases. The Board's approach was succinctly stated in *Trim Trends Canada Limited*, [1986] OLRB Rep. Mar. 364 at 365 as follows:

Before it will exercise its discretion to direct the taking of a representation vote on the basis of a statement of desire, however, the Board must be satisfied that when union members signed a statement indicating an apparent change of heart, they were doing so voluntarily, and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer and result in reprisals.

The reason for this approach was set out in *Chatham Concrete Forming*, [1986] OLRB Rep. Apr. 426 (and the cases cited therein) as follows:

13. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about the virtues of trade union representation (see Rule 73(2)), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and to protect employees from possible employer reprisals the anonymity of the union supporters is preserved. That is the way it has been for more than thirty years, ... Representation votes are a residual mechanism resorted to where the union cannot demonstrate a "clear majority" (i.e., more than fifty-five per cent) or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

• • •

16. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? While an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. And lest it be thought that the identification of union supporters and opponents is neutral information, one must remember that the Legislature does not regard it that way. Section 111 of the Act is designed to preserve the secrecy of the employees' choice. The Legislature has recognized the employees' concerns and sensitivities. ...

100. Having reviewed the evidence in its totality we are not left with the requisite assurance that employees signed the petition without fear for their job security or fear that whether or not

they signed would come to the attention of management. A number of factors, taken together, lead us to the finding that it is more probable than not that a reasonable employee might well have signed precisely because of those fears.

101. There is no direct evidence of management involvement in the preparation and circulation of the petition. And, although much was made of it at the hearing, we do not find that the provision of the list of employees is particularly important in the circumstances of this case, given what preceded it. We cannot rely on the petition as a voluntary expression of the employees wishes because of the perception created, not by the list, but by the events which preceded the circulation of the petition and the manner in which it was circulated.

102. It must be remembered that the petition was circulated some twelve days after the layoffs which were widely discussed as connected with the union activity of some of those laid off. Within those twelve days, most employees had been at three significant meetings.

103. The first of these was to consult them about the possibility of future layoffs. The person who put the options to them, MacDonald, told them he had just met with Cross and Kluey. It was clear things were not good, and future layoffs were enough of a possibility to have the meeting to discuss how they might be implemented. MacDonald does not deny linking the union and worsening prospects; what he denies is specifically saying that the plant would close and saying anything about layoffs to Flanagan. For his part, Doyle, who we find to be closely associated with management, although not a foreman, made it clear that he told the meeting that the union would probably cause the plant to be closed. Even though he did not physically circulate the petition, it is clear that he was identified with the petition in the mind of at least the one employee who volunteered to help him circulate one. This is not surprising, since he raised the issue of a petition to rescind union cards in the meeting about options for future layoffs.

104. The second meeting was an impromptu meeting about the union on the shop floor at which no one spoke in favour of the union. Since the major vocal supporters of the union had been laid off the week earlier, this is also not surprising. This meeting was broken up by the foreman Somers, but led to the third meeting, later the same day.

105. In the third meeting, although Cross and Kluey refused to discuss the union, it is clear that the union campaign, and its juxtaposition to the worsening economic position of the company, were prominent in the minds of many employees. At least Doyle and MacDonald went to the meeting intending to discuss the union, only to have it take the route of discussion of the company's plight in hard economic times. Contributing to the atmosphere in which these meetings were held, of course, were the letters dealt with above, which clearly linked the company's financial position as set out in Kluey's posted memo with the choice facing employees on the union. It would be an understatement to say that the average employee, given the layoffs, together with the open question of whether they were related to union activity, the meetings, and the letters, would be wondering about job security. This is the context in which the circumstances of the circulation of the petition must be seen.

106. By the time the petition was circulated, then, concern for job security was extremely heightened, and many were unsure whether or not people had already lost jobs because of union activity. MacDonald had recently been the spokesperson in a meeting where he had informed the employees that he had had a private meeting with Cross and Kluey, and was concerned about the union's having a worsening effect on the company's economic position. He then approached the employees in turn and asked them if they had signed a union card. Some of them told him they were signing because they saw specific others signing, demonstrating the lack of confidentiality about who was signing among the employees. The sequence in which only those who said they had

signed union cards were asked to sign was capable of identifying fully who had and who had not signed a card to neighbouring employees, as each employee was approached in turn at his work station.

107. Nor was confidentiality from management even remotely assured by the circumstances. Indeed, it is quite possible that others than MacDonald were aware of the presence of foreman Somers before he stopped MacDonald and would conclude that he was aware of what MacDonald was doing, and would be receiving the information gathered. It is clear from Somers' testimony that he knew what was going on. It is highly likely that other employees did not miss this fact. But whether or not they did, a reasonable employee, approached by the work sharing representative on company time, to be asked if he had signed a union card would likely fear that this information was not confidential from management. This is particularly true because of MacDonald's role in the meeting the previous week about the prospect of future layoffs. On answering yes, the employee was then asked to sign, with his clock number. There was no evidence that anyone refused. Clock numbers are normally used by employers to keep records on employees. No other reason for their presence on the petition was provided to the employees or to the Board. We find that it is highly probable that some employees signed out of fear that whether or not they signed would come to the attention of management and have potentially negative consequences for their jobs. Thus, we will not rely on the petition to cast doubt on the membership evidence filed by the respondent.

108. The union withdrew its challenges to the list filed by the employer, without prejudice to its original position. But for the petition, the union had enough membership support in the agreed-on bargaining unit to be automatically certified. Having decided that the petition is not a reliable indication of a voluntary change of heart, we will certify the union.

109. The applicant also pleaded section 8 and the particulars of the section 91 complaint in support of that. In view of our decision that the union has the requisite membership support for certification, it is unnecessary to consider the application under section 8.

The Promissory Notes Allegations

110. The union further alleges that the company has breached sections 3, 65, 67, 71, 81 [formerly section 79] and 82 [formerly section 80] of the Act, by offering and circulating promissory notes to employees who remained at work after the layoffs. The union did not give its consent to this proposal and the union alleges that this was not only in breach of the freeze provisions but was designed to encourage favouritism towards the employer by the remaining employees and to undermine support for the union amongst those employees, and was thus in breach of various other sections of the Act.

111. The company answers that it was in the habit of providing advances for various things. For instance, a tool allowance advance of up to \$400.00 repayable at the rate of \$20.00 per pay period, was available to full-time employees. Vacation pay advances were also given in cases of need.

112. Jeanes testified that during the period when the UIC money was slow coming in, he was receiving questions hourly about where the money was. He asked Cross if there was something that could be done about it. He suggested advances of \$400 which was a bit less than 60% of what was owing from UIC. He saw it as parallel to tools and vacation pay advances. It included all people still on work share.

113. We accept the company's explanation and find they have discharged their onus on this

point under section 91, in regards to the allegations of breaches of sections other than section 81. It had been expected that the UIC money would have been in at the point that the advances were offered. The advances did not put the remaining employees in a favoured position relative to the unemployed individuals any further than the layoffs had done. The advances were aimed, we are persuaded, at making the situation with the Work Sharing Program closer to what had been the understanding of how it would work well before the union drive had started. Under section 81, we are not convinced that the company's action was inconsistent with "business as usual", in that from time to time advances were offered for various purposes. This portion of the complaint is dismissed.

O'Connor's discipline

114. The union further alleges that Shawn O'Connor was disciplined for discussing the trade union on company time while supporters of the petition were allowed to talk and move freely amongst other employees in the plant for the purposes of opposing the union.

115. On July 24 or 25, shortly after he had returned from vacation, O'Connor was warned by his foreman, Jim Casey about discussing the union on company time after the third or fourth complaint from other employees. Casey had gone to Jeanes complaining that O'Connor was holding up production in the plant. Jeanes and he then went to give O'Connor the warning together. Casey had spoken to O'Connor informally before this point; O'Connor acknowledged in evidence that when he was reprimanded he knew he should not be organizing on company time. O'Connor said that MacDonald should be warned too. MacDonald was subsequently warned twice for his activities in opposition to the union on company time. We are satisfied that these warnings were even-handedly applied and are not unlawful, as they were directed at production and not union activity.

Allegations of Intimidation of a Witness

116. The union alleged that officials of the respondent had been attempting to persuade a bargaining unit employee to testify against the union in these proceedings and that Jeanes and Casey discussed this on August 16, 1990 in the plant washroom.

117. O'Connor testified that he heard Jeanes and Casey mention the employee's name in the washroom and whether or not he would be able to come down to the Board. He supposed they meant on behalf of the company. The company witnesses Jeanes and Casey deny that any threat was made and gave a credible explanation of why they were discussing that particular employee. He had come to them asking if he had to appear on behalf of the union as he had heard the union might be subpoenaing him. He wanted a leave of absence. Jeanes had a discussion with the employee and Casey about this in the washroom, telling him the conditions under which he could have the time off, which related to his status with the Workers' Compensation Board, and not anything to do with his support or lack thereof for the union. We are satisfied that the evidence before us does not establish, directly or by inference, that this was an attempt to persuade him not to testify as alleged. They were responding to a request originating from the employee, and the evidence satisfies us that there was nothing improper in their response. The complaint is dismissed on this point.

Benefits Allegations

118. When Jeanes met with the laid-off employees on July 5, he made an offer to them of continuing their benefits, at the employee's expense, since it was to be a temporary layoff. When Jeanes did not receive a response by the end of July as asked, he terminated coverage when premiums ended. We are not persuaded that the company's explanation of this action lacked credibility

or that it was motivated by anti-union animus. The complaint is dismissed in regards to the benefits issue.

Subpoena Allegations

119. The union alleges that foreman James Casey questioned Shawn O'Connor as to whether he needed to comply with a summons to appear before the Board, an implicit suggestion that O'Connor did not have to attend a Board hearing. O'Connor's account of this is that Casey asked him to look into whether it was a legal document as there was supposed to be a certain amount of notice. Casey's evidence is consistent with this. We are satisfied that O'Connor was in no way pressured not to give testimony. When it was clear O'Connor had to comply, Casey did nothing to prevent him. In the sensitive climate of the plant after the hearings started, it is understandable that the union and O'Connor were concerned about any questioning about a Board subpoena, but we are not persuaded that Casey's conduct amounted to a breach of the Act.

The Union Pin Incident

120. On Monday, August 27, Somers, the foreman, approached David Preston who was wearing a union pin on his lapel, and told him to remove the pin immediately as there was no union yet in the facility. He further told Preston that he could make things pretty miserable for him in the plant in view of his support for the trade union. The foreman later returned to Preston's work area and spoke to him further, apologized and said that he should never have made those statements and he would never act toward Preston in that regard. In testimony, Somers said he had "lost it" on that occasion, but felt that if one side could not promote its cause on company time, neither could the other. Preston, in turn, apologized for wearing it. Despite Somers' retraction and apology, this remains virtually an admitted violation of the Act, although its effect is lessened by the retraction and apology. Saying he could make it miserable in view of his support for the union was a threat, even if retracted later, for the exercise of rights under the Act. We find the company violated the Act in this respect.

The September Layoffs

121. On September 14 Messrs. O'Connor, McFarlane, Maurice and Ramkissoon were laid off from the Railroad department. The union alleges that these layoffs targeted employees who supported the union and had attended at the Board to give evidence in preference to junior employees with fewer skills who were retained. Specifically, it was alleged that O'Connor was not transferred to other positions in other classifications for which he was able, willing and qualified while such positions continued to be filled by junior employees. Some of those employees were known to be anti-union. It is specifically alleged that O'Connor and Ramkissoon were laid off because of their support for the union or at least principally because of that.

122. The company justifies these layoffs on the basis of a downturn in the railroad business. The layoffs were attributed directly to a bid for a contract for VIA rail for the conversion of 25 boilers, which they did not get. In this instance, both foremen were consulted as to who should be involved. Casey says that he picked employees to stay who needed virtually no supervision and who came into work all the time. He was able to avoid layoffs in electrical because there was a backlog of VIA control panels which needed work. At the meeting in which the employees involved were advised of their layoff, they were told that the layoff was based on seniority and job performance.

The Selection of Individuals for the September Layoffs(a) Shawn O'Connor

123. Casey maintains that the layoff of O'Connor had nothing to do with his union activity or his having been subpoenaed to give evidence for the union at the first days of the certification hearings. Instead it was based on keeping the individuals best suited to do the work.

124. Casey testified that O'Connor was laid off because he needed a lot of supervision, a problem which was mentioned to Jeanes and O'Connor but not documented in writing. Casey told Cross at the time that O'Connor was only good for dismantling and assembling boilers and that was the work they had lost. Casey swore that the question of union support never came up during the discussion of layoffs. O'Connor denies that he needed a lot of supervision, and says he had received no complaints about his work. O'Connor said he thought he had a good relationship with Mr. Casey until the warning for discussing the union, after which he felt he was treated very coldly at work.

125. O'Connor had written warnings for his tardiness and also for accidents operating company vehicles, although driving was not part of his regular job.

126. O'Connor testified that after the March layoffs he had been worried and had approached Casey who had told him that he did not have to worry because he was in an apprenticeship program and there was no problem with his work. He says he had asked Casey about this a number of times before this as well. Casey denies this, saying he did not know if his own job was secure, so that it was impossible to guarantee O'Connor's.

127. At the time of O'Connor and Ramkissoon's layoff in September, those remaining in railroad were, from O'Connor down, in order of seniority:

O'Connor
Chang
McFarlane
Maurice
Ramkissoon
Dicks

128. O'Connor, McFarlane, Maurice and Ramkissoon were laid off. Casey said that Chang was retained in preference to O'Connor because he was very good at repairing safety valves, work the company still needed, which O'Connor had never done and that Dicks, who had been laid off on July 5 and recalled on July 30, was retained as he was the only one who knew how to do specific needed work on regulators. This evidence was not contradicted.

129. Another employee, Drury, was transferred to the service arm of the operation, a separate company, around the same time. Casey said that O'Connor had not "taken the option" to do service in the past and thus was not considered for transfer to the service department. O'Connor says he had been out on service calls to help with lifting, probably more than Drury. However, after his accidents he was not driving for the company, and so at the time of the layoff there had been a ten month period during which Drury had gone on service when O'Connor had not. A similar option was given to Steve Dick in July, who was recorded as a "quit" for the purpose of the work share program. The company's evidence was that this would have been on the request of the service department.

130. The choice of O'Connor after the fact of his union activity had become a concern to the company deserves careful scrutiny. However, the need for the layoffs after the loss of the VIA work was not disputed. Nor was the number of people needed to be laid off. The explanations for the retention of the people retained out of seniority given by the company were credible and explain O'Connor's layoff even without the performance concerns the company had about him. Even if Casey was reassuring in March, things were worse in September, and thus nothing in particular is to be inferred from any such statements. On balance we find that the company has discharged its onus of establishing that valid business reasons, rather than anti-union animus, caused the layoff of O'Connor.

(b) Ramkissoon

131. Ramkissoon was laid off because the company did not need him even though he was doing overhaul of parts. He had "big attitude problems" in Casey's view. He did not get along with people and "had a lot to learn". There was no evidence that the company perceived or had any reason to perceive Ramkissoon as a union supporter, other than the bare fact of his being subpoenaed. Casey's evidence was uncontradicted and not inherently problematic. Ramkissoon would have been laid off even if the layoff had been done by seniority. We find the company has discharged its onus in regards to Ramkissoon. The complaint is dismissed in regards to Ramkissoon.

Failure to Recall

132. In Thermocoil, Freeman and Flanagan were not replaced, although Freeman was a ticketed welder. Jeanes said none of the grievors were recalled to replace them because there was a hiring freeze and there was no work in the shop. Wilson was recalled in September because of his superior coilwinding skills. It was not argued that any of the other grievors should have been recalled to do that work.

133. In railroad, Dicks was recalled on July 30 rather than others because he was the only one capable of doing a special order of repairing safety valves. This was not contradicted. Although the union argues Dicks, and Miles, the employee he was recalled to replace, were doing two different jobs, their classification on the list filed by the employer in the certification application is the same, and other evidence indicated that the jobs in railroad are more interchangeable than in the Thermocoil division. Dicks was also the more senior of the two laid off out of railroad in July.

134. In October, Casey decided to recall Brian Maurice to build barcos (steam connectors), something that a number of the grievors were able to do. Casey was instructed that the company would be questioned if O'Connor was not called back, but that he was to pick the best person for the job. Casey said that Maurice was twice as good as O'Connor and that is why he was recalled in preference to him. Based on that he authorized Jeanes to recall Maurice. This evidence was not contradicted.

135. The union sought to lead evidence to the effect that in January, 1991 the company advertised for and hired a new storeskeeper. The company objected to the introduction of evidence about this as it was sought to be introduced on February 7, during the cross-examination of the General Manager, Cross, his direct examination having been closed the day before. Mirza, the other decision maker, had given his evidence on February 4. This allegation could have been particularized before they gave their evidence as the union had known about it for a number of weeks before their evidence was given. The Board ruled that it was too late in the case to introduce new allegations.

136. We are satisfied that the choices of recall made by the company during the period before us were not motivated by anti-union animus, but by valid business reasons.

Layoffs made permanent

137. On October 3, 1990, the temporary layoffs were converted to indefinite ones, effective October 19, 1990. It is the company's position that this was done in accordance with the *Employment Standards Act*, as thirteen weeks had elapsed since the temporary layoffs. The union thought it should have been consulted. We are persuaded that the act of making the layoffs permanent is not a breach of the Act, given the *Employment Standards Act* and our finding on recall above.

Summary and Remedy

138. In summary then, the section 91 complaint is allowed in respect of the July layoffs, the July 11 letters from the company to the employees and the incident regarding Preston's wearing of a union pin. It is dismissed in all other respects.

139. To remedy the adverse impact of the above violations, the Board directs the respondent:

- (a) to reinstate the grievors from Thermocoil and compensate them for all losses due to their unlawful layoffs. The matter of the amount of compensation is remitted to the parties to deal with;
- (b) to compensate Sanders for all losses suffered during his unlawful lay-off from July 5 to September 15 (when the second set of layoffs occurred, given our finding that those layoffs would have occurred by then in any event);
- (c) to compensate Dicks for all losses suffered during his unlawful layoff from July 5 to July 30, (when he was recalled);
- (d) post copies of the notice appended to this decision in conspicuous places on its premises, including commonly used bulletin boards, where they are likely to come to the attention of the employees, and keep the notices posted for sixty days, taking reasonable steps to ensure that the said notices are not altered, defaced or covered by any other material.
- (e) mail a copy of the notice to each employee in the bargaining unit within 30 days of this decision.

140. We will remain seized to deal with any difficulties implementing this decision, or any dispute over quantum of compensation owing.

141. Having regard to the agreement of the parties on the description of the bargaining unit, the membership evidence filed by the union, and our decision on the petition set out above, a certificate will issue to the applicant for the following bargaining unit:

all employees of the respondent employed in the Town of Aurora, save and except foremen, persons above the rank of foreman, office, clerical, and sales staff, and students employed during the school vacation period,

which we find to be a unit of employees appropriate for collective bargaining.

DECISION OF BOARD MEMBER R. M. SLOAN; February 24, 1992

1. With respect, I dissent from the decision of my colleagues on a number of matters as detailed below.

2. My first concern with respect to the application is that it raised so many allegations of misconduct - the majority of which were found to be without merit - that it appears, to me at least, that the strategy of the applicant was to present to the Board a considerable number of allegations of wrongful behaviour on the part of the respondent, that the Board would be negatively influenced towards the respondent.

3. Examples of the applicant's approach with respect to allegations include: the promissory notes allegations (paragraphs 110 through 113); O'Connor's discipline (paragraphs 114 & 115); Allegations of intimidation of a witness (paragraph 116); Subpoena allegations (paragraph 119); and I would also include the "union pin" incident.

4. My first disagreement with respect to the majority decision is with the finding by the majority that the letter written by Mr. David Kluey and distributed with employee's pay cheques on July 12, 1990, is in violation of section 65 of the *Act*.

5. While the contents of the letter may not encourage unionization, they clearly are within the bounds of employer free speech previously accepted by the Board. Mr. Kluey's comments present to the employees factual material that they can take into consideration when making their own personal decision with respect to union representation.

6. To find that the somewhat innocuous material contained in the July 12 letter violates section 65, in the light of the right to free speech - in itself - and also with reference to previous Board jurisprudence, in my view, prevents the respondent from exercising its rights in this area and in effect negates the "free speech" right given to employers by virtue of the provisions of section 65 of the *Act*.

7. The second area of disagreement which I have is in relation to the petition document.

8. It is clear to me that Mr. Wayne MacDonald was the sole originator of the petition and that he did, quite properly, obtain the help of Mr. Dan Doyle in the petition process - but without any assistance or involvement from management personnel.

9. In my view, the petition meets the rigid standards required by the Board with respect to the petition's origination, circulation, custody and disposition.

10. The fact that the total petition process was not perfectly executed - whatever flaws the majority notes are, in my view, minor ones - is to be expected in view of the time constraints and the absence of experience in these matters by Mr. MacDonald. He was advised by his supervisors at the outset of the process that he was on his own and he proceeded accordingly.

11. I find the petition document to be voluntary and would order a representation vote.

12. In dealing with the layoffs I believe that it is important to acknowledge as the panel does, unanimously, that the layoffs in March, July and September, 1990 took place for legitimate business reasons.

13. Having established that, the concern that the majority has, resulting in an adverse finding against the respondent, with regard to the July 5, 1990 layoffs, is that:

- (a) the people who were selected for the layoff; and
- (b) the method used in selecting those employees subject to the layoff;

were tainted with anti-union animus.

14. It is accepted that Mr. David Cross, immediately prior to deciding upon the need for a manpower cut-back, was aware that Mr. Watson's name was associated with potential union organizing activity. Mr. Cross gave credit to this report, as he was aware of some dissatisfaction on the part of Mr. Watson due to an overtime payment issue.

15. Based upon legal advice received before consideration was given as to who would be laid-off in the July 5, 1990, cut-back, Mr. Cross took extraordinary measures to avoid any possible suggestion that supervisors, like Mr. Brian Somers for example, who might be perceived to have some knowledge of those employees who were union supporters, were excluded from the downsizing considerations.

16. Mr. Noshir Mirza, the Chief Engineer was selected to assist Mr. Cross in the layoff process because of: his knowledge of the operation; his knowledge, even if not complete in all instances, of employee skills, qualifications and performance; and his lack of any knowledge of union organizing activity and consequently no knowledge whatsoever as to any such involvement by any of those employees under consideration.

17. There is no doubt in my mind that the layoff process was conducted in a fair and objective manner without anti-union animus.

18. A significant point regarding the selection process which, with all due respect to my colleagues, they appear to have discounted has to do with the attitude, productivity, and performance of various of those employees who were laid off on July 5, 1990.

19. Certainly such matters are of legitimate concern to a company facing financial difficulties and forced to retain those employees best suited to do the work including their attitude towards their supervisors and fellow employees.

Summary

20. I concur in those parts of the decision which dismiss a number of the allegations against the employer.

21. I find that the petition was voluntary and would order a representation vote.

22. I find that all of the July 5, 1990 layoffs were made entirely free of anti-union animus.

23. I find that the punitive compensation measures ordered by the majority are without justification and can only unnecessarily harm the financial viability of the respondent.

24. With respect to the order requiring the respondent to post a notice proclaiming a breach of the *Act* I am compelled to object to this Board practice on a number of grounds.

25. The first, and most important, is that the posting of such a “*mea culpa*” notice contributes absolutely nothing to good labour relations in the work setting, on the contrary, the requirement is counter-productive and presents a real impediment to the establishment of good relations by holding one of the parties up to public scorn and ridicule.

26. If, as I understand it, the posting of the notice is to impart information to employees then the written Board decision is a much better and more complete vehicle to accomplish that purpose, and is available as a public document to any employee or individual who wishes to acquire it.

27. In the present case the employer is found by the majority to be in breach of the *Act* not through direct and obvious acts or behaviour but by inference only. Surely under such circumstances the penalty - for a penalty it is - of having to post such a notice is profoundly unfair and unjust.

28. The notice posting requirement, and its record of application and enforcement, in my view, reflects poorly on the Board's attempts to convince all parties who appear before the Board that justice is equally dispensed, and such a requirement is most certainly not in keeping with the letter or the spirit of the furtherance of “harmonious relations” as espoused in the preamble to the *Labour Relations Act*.

DECISION OF BOARD MEMBER D. A. PATTERSON; February 24, 1992

1. I dissent from the majority decision in a number of areas regarding this case.

2. I do not disagree with all the findings of the Vice-Chair. In fact I join with the Vice-Chair in a number of areas where I believe her interpretation of the evidence is the same conclusion I would have arrived at. However, there are other areas where I believe the Vice-Chair has put a different interpretation on the evidence than I would have. I am directing my dissent to those areas where I feel it necessary to explain why I would have come to a different conclusion on the same facts.

3. I concur with the Vice-Chair in the following areas using the same format as the Vice-Chair in the decision. I agree in finding a breach of section 91 [formerly section 89] of the *Act* by the respondent in the way it dealt with its employees for the July layoffs. I also agree with the Vice-Chair's finding that the respondent is in breach of section 65 [formerly section 64] of the *Act*. The breach in question being the letters of the respondent's president, David Kluey. I also agree in the finding of the petition failing to represent the voluntary wishes of the employees. I concur that the company also breached the *Act* by the actions of its foreman Brian Somers making a threat to an employee wearing a union pin. Since I have joined with the Vice-Chair in the majority decision regarding the breaches of the *Act*, I also join in with her remedy for the applicant.

4. It is my interpretation of the evidence that the respondent did display and exercise animus in its dealings with its employees and directly interfered with the employees ability to exercise their rights under the *Act*. It is the respondent's own inconsistencies in applying its labour relations policy which I believe reveal its animus. Those inconsistencies were designed to defeat the applicant's attempt to organize the employees of the respondent. This is not a fly-by-night employer like most corporations its size; its policies and labour relations practices are not make-shift or spur of the moment decisions. The respondent, as stated in the main body of the decision in paragraphs 2 and 3, had a policy of coping with lack of orders, decreased orders and a worsening economy by addressing these problems as a responsible corporate citizen by taking certain measures. These measures would include things such as pre-authorized overtime, not replacing terminated or for-

mer employees, expanding overtime and vacation credits, granting time off, and finally laying off employees. The respondent involved its foremen in this decision, the foreman were consulted about the layoff before it took place. The respondent's argument, which it asked the Board to believe, was the concern over losing experienced skilled workers to their operation. The respondent's representative Bill Jeanes also investigated the possibility of instituting a Work Sharing program to alleviate the declined work orders problem, which the employees agreed to. In exhibit #6, David Cross sent a letter to employees regarding the Work Sharing Agreement. I interpret the message in that letter to be saying to each employee that by agreeing to the Work Sharing Plan there would be no layoffs. This policy changed dramatically shortly after the respondent found out the applicant was conducting an organizing drive. Foremen weren't consulted, nor were employees when the decision was made. Foremen knew of the layoff a half an hour before the layoff slips were handed out. The respondent breached the Work Sharing Agreement by laying off but were able to convince the Unemployment Insurance Company (U.I.C.) Work Sharing representative, Mr. Gulliver, they were not aware of the Work Sharing Agreement which stated there would be no layoff during the duration of the program. I believe this area should be dealt with separately from the inconsistency argument in more detail. I will deal with Work Sharing further in my decision.

5. Also inconsistent with the respondent's policy as originally stated was how it dealt with the recall of certain employees. Foremen in this case were consulted and they were asked which employees were best suited to be recalled back to work for the type of work that was available. The question being of those employees laid off who would/should be recalled to the jobs available. I am not suggesting the foremen exercised any animus on the recall since they reacted to the respondent's queries. The animus rest with the executive decision makers above the foremen.

6. When I put all these inconsistencies together and weigh their effects on my determination, and I consider the timing and cumulative effect, and how these employer actions would be interpreted by a reasonable employee, I draw the inference that animus was the motivating factor involved in the dramatic shift in policy in dealing with its own employees. The timing and impact of the actions I conclude was two fold. Firstly, these actions sent a clear message to the employees. Secondly, these actions were fatal blows to not only inside organizers for the applicant but also its supporters, and finally, the impetus for the objecting employees to garner signatures on their statement of desire. The obvious question is whether I would say the employer can't do any of these things under the circumstances it faced when it decided to layoff employees July 5, 1990. I state the employer can do whatever it feels necessary under what circumstances it feels warrants whatever action, within the law. But I retort by stating that the respondent asked this panel of the Board to accept in evidence how it handled similar circumstances in March 1990 which the Board has, but I cannot accept a totally different rationale or such a different policy approach in July 1990. When I consider the events and the respondent's knowledge of those organizing attempts by the applicant, this is where I draw the strong negative inference as to why the respondent did what it did concerning those layoffs. I would not have been able to draw the same inference if the respondent's actions in July mirrored their returns in March when they laid off. I also reiterate the respondent entered into a Work Sharing Agreement with its own employees and the Canada Employment and Immigration Commission (CEIC) to prevent any layoffs.

7. I want to now focus on the Work Sharing Agreement. I feel this is an area for which I have some expressed concern which I feel bears more scrutiny. I disagree with the majority that the company had not guaranteed there would be no more layoffs if employees agreed to participate in the Work Sharing Program. A number of witnesses gave evidence that they understood the company to have said if the employees participated in the Work Sharing Program there would be no layoff. Mr. Jeanes brought the program to the attention of Mr. Cross in early spring as a potential means to combat a slow period in business. The program was attractive because it would take the

place of potential layoffs if necessary. The program was not flexible once the respondent had accepted. Employees could utilize the program one or two days per week which would equate into a 20% to 40% cut in hours worked while at the same time employees would collect Unemployment Insurance payments to offset the loss of wages for the time involved, amounting to 60% for each day on Work Sharing. The object being to eliminate any potential layoff. In return for approval from the CEIC, the applicant for Work Sharing agrees not to layoff anyone during the duration of the program. Mr. Cross met the employees and explained the program after which the employees agreed to the plan to avoid layoffs. The contract with Canada Employment and Immigration Commission (CEIC) was signed for the respondent by Susan Jones and David Cross, by the employee representatives and by the CEIC. The respondent with its experience in dealing with contracts and bidding on jobs would lead the Board to believe it did not know it couldn't lay people off while a party to the Work Sharing Agreement with CEIC. This was after its Human Resources Manager, Bill Jeanes, gave evidence that he made sure Wayne MacDonald of the employee representatives and the representative of the petitioners knew the ins and outs of the program so he could answer employee inquiries about the program. Also in exhibit #62, paragraph 2, the program prohibits increase/decrease of Work Sharing and will notify CEIC within three days of any change. The respondent did not do this in either layoff.

8. It is my opinion that the respondent pleads its own ignorance regarding the Work Sharing Plan yet made it well known around the plant that any employee who quit without giving sufficient notice would be fair game for the company as was one of its foremen Mike Caughlin who failed to give proper notice and was sued for insufficient notice. The respondent even went as far as to post the outcome of this case on the bulletin board for all employees to read and see. The inference I draw from this action is that the company certainly read the laws of employment on quits and notices of resignations so I find it implausible they wouldn't read their agreement with CEIC for the Work Sharing Program.

9. It is apparent that the respondent was able to convince Mr. Gulliver from CEIC that they weren't aware of the no layoff provision in the contract because after the layoff Gulliver gave the application his approval. It was his opinion that the respondent wasn't aware of that particular stipulation. Also Mr. Jeanes stated that he talked to Sandy Earl receiving her permission for the layoff. Ms. Earl flatly denied giving any approval and her evidence was she did not have the authority to give such permission. She clearly stated the parameters of her authority which is undisputed, and after the number of years I've personally been exposed to Federal and Provincial civil servants, I am sure a processing clerk would not give permission to amend or change any agreement for which she is not personally responsible.

10. The respondent pleads ignorance of the agreement on the first layoff but tendered no explanation for their excuse on the second layoff during the Work Sharing Program. I find it very interesting that Mr. Kluey was vigilant in his approach to his industry and the government's decision to amend boiler regulators. The claim being a Japanese competitor Miura had a corner on the market by these changes. Kluey initiated letter writing campaigns for the employees to attempt to get the government to reverse its decision. The double standard here being the respondent breaches an agreement with CEIC, not once, but twice, defeating the purpose of the Work Sharing Program. It is beyond belief to me that Mr. Kluey and Mr. Cross, who sign all the CEIC Work Sharing Agreements for the company and especially Mr. Jeanes, because he attended the seminar in Work Sharing and did all the paperwork, failed to read the agreement which strictly prohibits any layoffs during the program. The agreement also states the program participant must notify CEIC of any changes to the program in advance and await approval.

11. Another obvious flaw in the respondent's argument that it did not know it couldn't lay-

off is the requirement that CEIC know the total number of employees to be laid-off if CEIC doesn't agree to the application. Those employees totalling ten (10) were listed as employees to be laid off if the Work Sharing Program application was not accepted by CEIC. Ten employees had asteriks beside their names, (exhibit #64). The respondent claims it did not put them there. We were offered no explanation as to how they did get there. CEIC employees did state they may have put them there in conversation with the respondent. It is interesting to note here that the asterisk names were not the same people laid off, nor are they with the exception of Mr. Caliph the most active inside organizers.

12. I believe the onus on this matter rests squarely with the respondent and not the union to prove otherwise, nor the CEIC employees since they claim the asterisks were there based on conversations with the respondent. If the respondent can not explain the origin of circumstances surrounding the names being asterisk then what possible inference would I draw. The only obvious one under the circumstances, a negative inference and in fact the respondent failed in its duty to discharge its onus in this question.

13. I would also like to focus on the role of counsel for the respondent. I would have concluded his actions not only tainted the statement of desire by the objecting employees but also were fatal to the respondent in distancing itself from the interests of the objecting employees. I join with the chair in concurring on the reasons why the petition should fail, I would however go further in exposing what I believe is further evidence of animus by the respondent towards the applicant. Counsel for the respondent took a proactive role in bolstering the objecting employees case and propping it up in areas where the respondent's counsel was aware their arguments and evidence was lacking. It is this Board members reading of the Board's jurisprudence that employer counsel's job is to establish no interest in the objecting employees statement of desire nor interest in its origination, circulation or circumstances surrounding the signing of the statement of desire. The Board has long held that the respondent and objecting employees are viewed as having similar interests in defeating the applicant. Their interests are aligned. I maintain the alignment from a obvious distance as permissible, but what I believe is not within the intent of the Act is for the respondent's counsel to have not only his own evidence to stop the applicant but also using the objecting employees' evidence during his cross-examination of the petitioners to bolster their flawed case or prop it up, or dress it up, in front of the Board. I would have drawn two inferences from counsel for the respondent's actions, one of blatant animus and the other of employer interference in the origination, circulation and "presentation of the statement of desire by the objecting employees".

14. In conclusion, let me summarize by stating that after all the evidence I have come to conclusions which I believe were part and parcel of the respondent's game plan from the outset. The employer had an experienced work force which it held in high regard. Its adopted policies and its dealing with its employees were designed to tackle a weakened economy. Its policies were designed to get employer-employee over some very difficult times so no employees with the experience they had would be lost to layoffs. It instituted a number of policies to stop any potential layoffs. In addition to that the respondent applied for and was approved for a CEIC program to eliminate layoffs called Work Sharing, a program which has been around for a long time. Employees were receptive to the idea based on what they were told by their employer. If they went on the program it would prevent future layoffs; there was even discussions about going on a three day work week with Work Sharing for two days. This all changed when the employer found out a union, namely the applicant, was attempting to organize the respondent's employees. The respondent received advice from legal counsel but I believe that advice did not stop the employer from deciding to simply layoff enough employees to catch as many union organizers or supporters as needed, and to assist the objecting employees, encourage them in their attempt to stop the union's

organizing drive and then justify its actions by way of a contract lost and worsening market conditions. In terms of facing the CEIC representatives, I believe they decided to plead no knowledge of the conditions of acceptance into the program that an employer will not layoff employees during the duration of the program.

15. It is unfortunate in such cases that this Board cannot award damages. I believe the only way the Board can ever really make the union whole again in these circumstances is to award damages.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT IN RESPECT OF THE JULY 5, 1991 LAYOFFS, THE JULY 11, 1991 COMMUNICATIONS AND AN AUGUST 27 1991 INCIDENT CONCERNING A THREAT FOR WEARING A UNION PIN. ALLEGATIONS THAT WE HAD VIOLATED THE ACT IN SEVERAL OTHER RESPECTS, INCLUDING THE SEPTEMBER, 1991 LAYOFFS IN RAILROAD, WERE DISMISSED. THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE
LAWFUL ACTIVITIES OF A TRADE UNION;

TO BARGAIN AS A GROUP, THROUGH A
REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE
BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE.

THERMOGENICS, INC.

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 24th day of February, 1992.

3219-90-R International Brotherhood of Electrical Workers, Local 353, Applicant v. T. Edison Electrical Enterprises Inc., Rudy Chiefari c.o.b. as Westview Electric Contractors, and Westview Electric Contractors Inc., Respondents

Collective Agreement - Construction Industry - Employer Support - Related Employer - Remedies - Voluntary Recognition - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. A. Correll* and *J. Redshaw*.

APPEARANCES: *Susan Philpott* and *Bob Gill* for the applicant; *Norman R. A. White* and *Rudy Chiefari* for Westview Electric Contractors Inc. and Rudy Chiefari c.o.b. as Westview Electric Contractors.

DECISION OF THE BOARD; February 12, 1992

1. The names of the respondents are amended to read: "T. Edison Electrical Enterprises Inc., Rudy Chiefari c.o.b. as Westview Electric Contractors, and Westview Electric Contractors Inc.
2. These are applications under sections 64 [formerly section 63] and 1(4) of the *Labour Relations Act*. The evidence did not support, and the applicant did not pursue in argument, the sale of a business allegation. Accordingly, the application is dismissed insofar as it relates to section 64 of the Act. With its section 1(4) application, the International Brotherhood of Electrical Workers, Local 353 ("Local 353") seeks a declaration that T. Edison Electrical Enterprises Inc. ("T. Edison"), Rudy Chiefari c.o.b. as Westview Electric Contractors ("Westview Electric") and Westview Electric Contractors Inc. ("Westview Inc.") constitute one employer for purposes of the Act. Local 353 requests the Board to declare that the respondents are bound to the Electricians Provincial Agreement and a housewiring agreement between Local 353 and the Electrical Contractors Association of Ontario.
3. Rudy Chiefari and Bob Gill, a business representative for Local 353, testified in this proceeding. In making its factual findings, the Board carefully reviewed the oral and documentary evidence and the parties' submissions relating thereto.
4. On May 30, 1986, Rudy Chiefari and D. Monaco signed a voluntary recognition agreement on behalf of T. Edison with Local 353 which provided that, in effect, T. Edison would be bound to the Electricians Provincial Agreement and a Local Appendix which covered certain residential work. Monaco and Chiefari each had a fifty percent interest in T. Edison. Their relationship in this business endeavour was initiated by Monaco, who was a general contractor with an interest in an entity called Architectural Contracting and a friend of Chiefari's. T. Edison was created to perform electrical work on a subcontract basis from Architectural Contracting. It appears that most, if not all, of the electrical contracting work performed by T. Edison came from Architectural Contracting and related to commercial projects. T. Edison entered into the voluntary recognition agreement because the projects were union jobs. The voluntary recognition agreement

was signed a couple of weeks before T. Edison started to perform work and at a time when it had no employees.

5. Monaco and Chiefari both played a role in incorporating T. Edison. They were directors of T. Edison and some documentation shows Chiefari to be the President. Although Monaco was the source of T. Edison's work, it appears that Chiefari was primarily responsible for conducting T. Edison's business. Chiefari priced the jobs, did the invoicing and the payroll, worked as an electrician and supervised the employees. T. Edison's business was operated out of Chiefari's home. When employees were needed, Chiefari contacted Local 353. Chiefari made the bank deposits and was in possession of T. Edison's records. Chiefari's brother was the bookkeeper for T. Edison. When Local 353 referred a grievance against T. Edison to the Board pursuant to section 126 [formerly section 124] of the Act, Chiefari attended a meeting with a Labour Relations Officer and executed a Memorandum of Agreement on behalf of T. Edison dated November 27, 1986. It appears that both Monaco and Chiefari were required to sign T. Edison's cheques.

6. T. Edison started performing electrical contracting work in June 1986 and stopped working no later than September 1986. During this period, it worked at shopping malls, primarily the Promenade Mall. Chiefari testified that when the voluntary recognition agreement was signed he was aware of the work which T. Edison was about to obtain from Architectural Contracting and that he expected to perform this work himself. When performing bargaining unit work, Chiefari only required his own hand tools. During the period of time it performed work, T. Edison employed at least three persons at various times.

7. After performing work in September 1986, Chiefari did not work for approximately two months. It appears that Architectural Contracting stopped subcontracting electrical work to T. Edison. In November 1986, Chiefari registered as a sole proprietorship using the name Westview Electric. The nature of the work he has performed since then is that of an electrical contractor. The initial work he obtained related to commercial jobs in shopping malls. Chiefari testified that approximately two percent of the electrical work he performed with Westview Electric in its first year was work in the ICI sector. Apart from that small percentage of ICI work in his first year with Westview Electric, Chiefari has only performed electrical work in connection with new homes. Chiefari testified that this work in the residential sector requires less skill and uses less voltage than one would generally find in the ICI sector.

8. In 1991, Chiefari created Westview Inc. to carry on his electrical contracting business. The evidence indicates that when he was a sole proprietor or under Westview Inc., Chiefari was in control. He bid the jobs, priced them and supervised employees.

9. As noted earlier, Local 353 pursued a grievance against T. Edison at the Board and obtained a settlement with Chiefari dated November 27, 1986. As part of the settlement, Chiefari acknowledged that T. Edison was bound by the Electricians Provincial Agreement and agreed to pay damages to Local 353. Chiefari testified that T. Edison did not pay any damages to Local 353 since it had not been paid for work it had performed. Local 353 pursued its claim and was able to recover some money in July 1987. Since the execution of the settlement, Local 353 did not have any contact with T. Edison. Bob Gill started working for Local 353 in July 1987 and in early December 1990, he received some information which caused him to attempt to contact T. Edison. He called Chiefari and left a number of messages for him to return the calls, but never received a reply. In early January 1991, a Local 353 representative went to the address of T. Edison and discovered it was a residence. In late January 1991, Gill contacted a lawyer which led eventually to the filing of this application in March 1991. Chiefari testified that he never mentioned Westview Electric to Local 353.

10. In his evidence, Gill identified the most recent collective agreement to which T. Edison was bound. He indicated that it covered work in the ICI sector and high-rise residential work - apartments and condominiums. He acknowledged that this collective agreement did not cover low-rise residential work. Gill also acknowledged that T. Edison never signed a low-rise residential agreement.

11. Counsel for the respondents argues that for a number of reasons Local 353 is not entitled to the relief requested. Counsel challenges the validity of the voluntary recognition agreement on the basis that T. Edison entered into it without intending to use members of Local 353. Counsel also argues that two of the pre-conditions to section 1(4) have not been met. He submits that the respondents are not under common control and direction and are not engaged in related activities. Counsel also contends that the Board should not exercise its discretion to grant section 1(4) relief in this case having regard to Local 353's delay in bringing this application. Counsel for Local 353 argued that the pre-conditions in section 1(4) have been met and that this was an appropriate case for the Board to grant Local 353 the relief it has requested.

12. Before turning to the section 1(4) issue, the Board will deal with the respondents' contention that the voluntary recognition agreement is invalid. Counsel argues that Chiefari did not intend to use Local 353 members when the agreement was executed. He submits therefore that the absence of such an intention distinguishes the facts here from those in *Nicholls-Radtke*, [1982] OLRB Rep. July 1028 where the Board upheld the validity of a "pre-hire" agreement. Counsel maintains that the voluntary recognition agreement in this instance is invalid since it was obtained with employer support contrary to the Act.

13. The Board is satisfied that T. Edison and Local 353 entered into a valid voluntary recognition agreement in 1986. In reaching this conclusion, we have considered the following matters. We have some difficulty in accepting counsel's assertion that Chiefari did not intend to use electricians supplied by Local 353 when the voluntary recognition agreement was executed. Chiefari was familiar with the extent of the subcontract work to be performed by T. Edison prior to signing the voluntary recognition agreement. Also, as soon as the need for other electricians arose, Chiefari asked Local 353 for electricians. When considered with the other evidence before us, these facts raise some doubt about Chiefari's testimony concerning his original intention. Perhaps a more accurate characterization of what occurred is that Chiefari did not anticipate using Local 353's electricians, but if the need arose he would use them. In our view, executing a voluntary recognition agreement with an intention to use union members if and when they are needed would not invalidate the agreement and would not be inconsistent with the principles in the *Nicholls-Radtke* decision.

14. A finding of employer support is not automatic even if one were to conclude that T. Edison did not intend to use Local 353 members when it signed the agreement. This is so because such a finding is not dependent on the employer's intention alone. One can infer from the evidence that Local 353 had every intention of supplying members to work for Local 353. The evidence does not indicate that anyone from T. Edison indicated to Local 353 that it never intended to use Local 353 members. Given that Local 353's conduct in this instance was consistent with entering into a valid "pre-hire agreement", the situation here is not caught by the employer support provisions of the Act. In determining whether a trade union has been the beneficiary of employer support within the meaning of sections 13 and 49 [formerly section 48] of the Act, the Board has regard to the purpose of those provisions. In *Edwards & Edwards Limited*, 52 CLLC ¶17,027, the Board expressed the following views on what is now section 13 of the Act:

The unfair practice sections of the Act (including section 45 [now 46] which prohibits the type of employer conduct referred to in section 9) [which latter section in its relevant parts was the pre-

decessor of the present section 10] are, in large part, designed to safeguard the freedom of employees to join and to bargain collectively through the trade union of their own choice which is granted in section 3. That purpose is furthered by the provisions of section 9 which places upon the Board the obligation to satisfy itself that no employer has meddled in the affairs of an applicant for certification. The section is clearly aimed at "company-dominated" trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned.

In *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806, the Board also commented on the purpose of section 13 at paragraph 27:

The broad purpose of the section, simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of employer support, does not owe its sole allegiance to those whom it seeks to represent. A trade union which has accepted the support of any employer whose interests may be affected by its representation places itself in a potential conflict of interest and thereby undermines itself as a union "qualified" to act on behalf of those it seeks to represent. Section 12 catches both the "sweetheart" arrangement between the parties directly affected and also the accepted support of any outside employer whose interests may be affected by the collective representation of those whom the union seeks to represent. In both instances the union's acceptance of employer support activates the Section 12 bar.

15. After an extensive review of the Board's jurisprudence in this area, the Board in *Cabral Foods Inc.*, [1985] OLRB Rep. Feb. 165 noted at paragraph 35 that "if a trade union's ability to be certified or to enter into binding collective agreements could be destroyed by unsolicited employer behaviour of which the union was totally unaware, sections 13 and 49 would cease to serve as protections from employer interference in employees' selection of a bargaining agent and, instead, become potent instruments for affecting just such interference".

16. In this case T. Edison entered into the voluntary recognition agreement in order to obtain jobs on union projects. Local 353 entered into the agreement with a view to supplying electricians to T. Edison. Even if Chiefari's intention was not to use Local 353 members, the principles in the above cases illustrate why this situation is beyond the scope of the employer support provisions. Clearly, Local 353 was unaware of and did not solicit the alleged employer support. We note as well that the section 3 rights of employees were not compromised since T. Edison did use Local 353 members.

17. Section 1(4) of the Act provides as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

18. As the wording of section 1(4) discloses, three conditions must be satisfied in order for the Board to exercise its discretion to treat more than an entity as one employer for purposes of the Act. They are:

- (1) there must be more than one corporation, individual, firm, syndicate or association or any combination thereof;
- (2) the activities or businesses of two or more of those entities must be under common control or direction; and,
- (3) the entities concerned must carry on related or associated activities or businesses.

19. The following paragraphs in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 set out the purpose and effect of subsection 1(4) of the Act:

12. ...

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [63] [now 64] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section [63] [now 64] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section [63] [now 64]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of businesses between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section [63] [now 64] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and

has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

• • •

15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in “associated or related activities or businesses” since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be “related” within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company, and cannot be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the “associated or related activities or businesses” need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business or endeavour or even contemporaneously economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be “related” within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of “privity of contract” or “the corporate veil”.

20. Counsel for Mr. Chiefari acknowledges that the first pre-condition has been met, namely the existence of two entities. After reviewing the evidence and the parties’ submissions, the Board finds that the remaining two pre-conditions have also been met.

21. Counsel argued that the entities were not under common control and direction since Chiefari did not control T. Edison. Since Monaco controlled the source of the work, counsel submitted that Monaco alone controlled T. Edison. The fact that Monaco was the source of the work does not lead to the conclusion that Monaco controlled and directed T. Edison by himself. The evidence discloses that to a significant degree the control and direction of the business came from Chiefari. Chiefari, who owned fifty percent of the company, was responsible for the day-to-day operations of T. Edison. He did the estimating and priced the jobs. He supervised the employees, sent out the invoices, did the payroll and carried on the business from his home. Chiefari did sign the voluntary recognition agreement along with Monaco and he executed the Minutes of Settlement resolving the grievance by himself. In material respects, Chiefari’s role with T. Edison is not unlike the role he plays with the other respondents. When one examines this issue from a labour relations perspective, one is compelled to find that Chiefari played a significant role in the control and direction of T. Edison. There is no dispute that Chiefari completely controlled and directed Westview Electric and Westview Inc. On the basis of these facts, the Board finds that T. Edison, Westview Electric and Westview Inc. were under common control and direction.

22. Counsel for Chiefari argued that the respondents were not engaged in related business activities since T. Edison performed work exclusively in the ICI sector while the other respondents performed work almost exclusively in the residential (new homes) sector which required less skill. However, the Board has interpreted the words “associated or related activities or businesses” in a manner consistent with the broad remedial purpose of section 1(4). In this context, it is useful to note the following comments in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature

("associated" or "related", "activities" or "businesses"), it is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine*, *Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC ¶14,270), and it is one with which we respectfully agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are "unrelated" - particularly if they are being undertaken at the same time and involve common managerial or employee skills...

23. All of the respondents are or were engaged in the business of electrical contracting. T. Edison did work exclusively in the commercial area and we note that Westview Electric performed the same kind of work during its initial months of operation. Given that Chiefari or his employees essentially only require hand tools to perform their work, it is quite easy for the business to perform work in different sectors of the construction industry. The relatively minor differences in the electrical contracting work performed by T. Edison and the other respondents does not support a conclusion that this pre-condition has not been met. On the facts before us, the Board finds that T. Edison, Westview Electric and Westview Inc. were engaged in related business activities.

24. Counsel for Mr. Chiefari also argued that the Board should not exercise its discretion in Local 353's favour because of Local 353's delay in bringing this application and because the effect would be to extend bargaining rights. Local 353 was unaware of the existence of Westview Electric until shortly before it filed its application. Chiefari did not advise Local 353 that T. Edison ceased operating and that he was operating Westview Electric. This is not a case where Local 353 was aware that Chiefari was operating a related company but delayed in obtaining relief. It is argued that Local 353 did not act with due diligence in protecting its bargaining rights. In the circumstances before us, the Board is not prepared to find that any delay or lack of due diligence on the part of Local 353 should disentitle it to some relief. In *KNK Limited*, [1991] OLRB Rep. Feb. 209, the Board concluded that delay should not be an automatic bar in a section 1(4) case. We adopt the general principles in that decision and particularly the following comments:

57. In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief" which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. If that were the test, the purpose of section 1(4) would be undermined, and the related employer could plead, in reply, the very "mischief" upon which the union relies and for which section 1(4) is a remedy. The argument becomes entirely circular. A union's undue delay in the face of knowledge of the corporate relationship (i.e. what section 1(5) suggests a union will *not* know) may be a factor to be considered in exercising the Board's discretion, but the focus should be on the actual prejudice suffered by the employer and the extent to which the union's inaction actually contributed to that prejudice. Where the union's inaction is so longstanding as to be tantamount to an abandonment of its bargaining rights, the Board may well dismiss the application. However, where the balance of labour relations interests can be achieved by limiting the retrospective effect of a declaration or granting such other relief "as it may deem appropriate", the Board should consider that option, rather than dismissing the application altogether.

25. Local 353 has established the legal requirements for a section 1(4) declaration. In the circumstances, the Board can find no prejudice or compelling policy reasons for not giving Local 353 the declaration it seeks. Accordingly, the Board hereby finds that T. Edison Electrical Enterprises Inc., Rudy Chiefari c.o.b. as Westview Electric Contractors and Westview Electric Contrac-

tors Inc. constitute one employer for purposes of the *Labour Relations Act*. In the circumstances, this declaration is limited to those commercial activities or contracts entered into by Westview Electric or Westview Inc. after the receipt of this section 1(4) application.

26. The Board also declares that Rudy Chiefari c.o.b. as Westview Electric Contractors and Westview Contractors Inc. are bound to the current Electricians Provincial Agreement and the Local Appendix covering high-rise residential work - apartments and condominiums. In essence, this is the same collective agreement to which T. Edison was bound in 1986. The effect of this declaration is to protect the bargaining rights of Local 353, not extend them.

27. As noted earlier, Local 353 also seeks a declaration that the respondents are bound to its low-rise residential agreement with the Electrical Contractors Association of Toronto. In taking this position, it relies on a Certificate of Accreditation issued in 1975 by the Board to the Electrical Contractors Association of Toronto for all employers of journeymen electricians and apprentices for whom Local 353 has bargaining rights in the ICI and residential sectors within a specific geographical area not here relevant. Local 353 also relies on its agreement with T. Edison executed in 1986 and the following subsection of section 130 [formerly section 128]:

130.-(4) Where, after the date of the making of an application for accreditation, the trade union or council of trade unions obtains bargaining rights for the employees of an employer through certification or voluntary recognition, that employer is bound by any collective agreement in existence at the time of the certification or voluntary recognition between the trade union or council of trade unions and the applicant employers' organization or subsequently entered into by the said parties.

28. The Board finds that it would not be appropriate to give Local 353 this declaration. As the evidence disclosed, T. Edison was bound to a collective agreement which covered certain work performed in the ICI sector and a part of the residential sector, namely apartments and condominiums. Local 353 does not have bargaining rights with T. Edison which covers low-rise residential work. The Board reads section 130(4) as providing that an employer will be bound by any collective agreement in existence as long as the trade union has bargaining rights for that employer for the work covered by the collective agreement. Since Local 353 does not have bargaining rights with T. Edison for low-rise housing work, the respondents are not bound to Local 353's low-rise residential agreement with the Electrical Contractors Association of Ontario. If we were to grant this declaration, the Board would be extending Local 353's bargaining rights and not preserving them.

CASE LISTINGS JANUARY 1992

	PAGE
1. Applications for Certification	23
2. Applications for First Contract Arbitration	34
3. Applications for Declaration of Related Employer.....	34
4. Sale of a Business	35
5. Crown Transfer Act	36
6. Applications for Declaration Terminating Bargaining Rights.....	36
7. Ministerial Reference (Conciliation Officer).....	38
8. Applications for Declaration of Unlawful Strike (Construction Industry)	38
9. Complaints of Unfair Labour Practice	38
10. Applications for Consent to Early Termination of Collective Agreement	42
11. Jurisdictional Disputes.....	42
12. Applications for Determination of Employee Status.....	42
13. Complaints under the Occupational Health and Safety Act	43
14. Construction Industry Grievances	44
15. Applications for Reconsideration of Board's Decision	48

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1992

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1736-89-R: The United Brotherhood Of Carpenters And Joiners Of America, Local 38 (Applicant) v. Niagara Relocatable Buildings Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Niagara Relocatable Buildings Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Niagara Relocatable Buildings Ltd. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3065-89-R: International Brotherhood Of Electrical Workers, Local 105 (Applicant) v. Wm. J. Davidson Electric Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Wm. J. Davidson Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Wm. J. Davidson Electric Inc. in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1460-90-R: Labourers', Local 527 (Applicant) v. Black & McDonald Limited (Respondent) v. International Brotherhood of Electrical Workers, IBEW Construction Council of Ontario, and Local Union 586, IBEW (Intervener)

Unit: "all construction labourers in the employ of Black & McDonald Limited in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by subsisting collective agreements" (21 employees in unit)

2918-90-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Havlik Technologies Inc. (Respondent)

Unit: "all employees of Havlik Technologies Inc., in the City of Cambridge, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (155 employees in unit) (*Having regard to the agreement of the parties*)

3173-90-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Byron-Hill Construction Corporation (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Byron-Hill Construction Corporation in the

industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Byron-Hill Construction Corporation in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (1 employee in unit)

0659-91-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Autrans Corporation, Nifast Canada Corporation (Respondents)

Unit #1: "all employees of Autrans Corporation in the Town of Ingersoll, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of Nifast Canada Corporation in the Town of Ingersoll, save and except forepersons, persons above the rank of foreperson, office and sales staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

1831-91-R: Laundry and Linen Drivers and Industrial Workers Union Teamsters Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Merls Pharmacy (Ontario) Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees Merls Pharmacy (Ontario) Limited in the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, bookkeepers and pharmacists" (47 employees in unit)

1991-91-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Chapman Miles Holdings Inc. c.o.b. as Loeb I.G.A. Southside (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Chapman Miles Holdings Inc. c.o.b. as Loeb I.G.A. Southside in the City of London, save and except Department Managers, persons above the rank of Department Manager, Bookkeeper/Head Cashier and office and clerical staff" (108 employees in unit) (*Having regard to the agreement of the parties*)

2262-91-R: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. St. Joseph's Health Centre of London (Respondent)

Unit: "all employees of St. Joseph's Health Centre of London, save and except registered nurses, undergraduate nurses, supervisors, persons above the rank of supervisor, co-ordinators, technical professional personnel, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (44 employees in unit)

2407-91-R: Ontario Public Service Employees Union (Applicant) v. St. John's Training School for Boys (Respondent) v. David Fisher (Objectors)

Unit: "all employees of the St. John's Training School for Boys in the Township of Uxbridge, save and except supervisors and persons above the rank of supervisor, office and clerical staff and persons regularly employed for not more than twenty-four (24) hours per week" (103 employees in unit)

2418-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Rodrigues Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, and construction labourers in the employ of Rodrigues Masonry Ltd., in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2445-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Dave Brown Masonry Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Dave Brown Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Dave Brown Masonry Ltd. in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2461-91-R: Canadian Paperworkers Union (Applicant) v. Domtar Inc. (Respondent)

Unit: “all office and clerical employees of Domtar Inc. at its Merchants Division-Buntin Reid in the Regional Municipality of Ottawa-Carleton, save and except supervisors and persons above the rank of supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

2501-91-R: United Steelworkers of America (Applicant) v. N.I.M. Disposals Limited, Mid North Iron and Metals Limited, c.o.b. as Northland Iron and Metal Limited, (Respondents)

Unit: “all employees of N.I.M. Disposals Limited, Mid North Iron and Metals Limited, c.o.b. as Northland Iron and Metal Limited in the Regional Municipality of Sudbury, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period” (36 employees in unit)

2506-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Minho Masonry Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2595-91-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Fort Frances (Respondent)

Unit: “all employees of the respondent at its Children’s Complex in Fort Frances, save and except supervisors and persons above the rank of supervisor, receptionist/secretary and persons for whom any trade union held bargaining rights on the date of application, November 6, 1991” (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2596-91-R: Canadian Union of Public Employees (Applicant) v. City of Gloucester Public Library Board (Respondent)

Unit: “all employees of City of Gloucester Public Library Board in the City of Gloucester, save and except the Director, Administration Secretary, Finance Officer, Recording Secretary to the Board, Head of Technical Services, Head of Cataloguing, Branch Heads, persons above the rank of Branch Head, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and per-

sons for whom any trade union held bargaining rights as of November 6th, 1991” (58 employees in unit) (*Having regard to the agreement of the parties*)

2644-91-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Les Construction Benoit Larrivée Ltée (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Les Construction Benoit Larrivée Ltée in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Les Construction Benoit Larrivée Ltée in all sectors of the construction industry in the Regional Municipality of Ottawa- Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2669-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stanley Acmetrack Limited (Respondent)

Unit: “all carpenters and carpenters’ apprentices, in the employ of Stanley Acmetrack Limited in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit) (*Clarity Note*)

2675-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Paul Paquette c.o.b. as Rainbow Foods (Respondent)

Unit: “all employees of the Respondent in the Town of Espanola save and except managers and persons above the rank of manager” (5 employees in unit) (*Having regard to the agreement of the parties*)

2723-91-R: Ontario Nurses’ Association (Applicant) v. Public General Hospital, Chatham (Respondent) v. Group of Employees (Objectors)

Unit: “all registered and graduate nurses employed in a nursing capacity at the Public General Hospital Society of Chatham, save and except unit managers, persons at or above the rank of unit manager, persons regularly employed for not more than 24 hours per week” (157 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2728-91-R: The United Food and Commercial Workers International Union Local 633 (Applicant) v. Barton Feeders Co. Ltd. (Respondent) v. v. Group of Employees (Objectors)

Unit: “all employees of Barton Feeders Co. Ltd. in Owen Sound, save and except forepersons, persons above the rank of foreperson, office clerical and sales staff, and persons regularly employed for not more than 24 hours per week” (17 employees in unit) (*Having regard to the agreement of the parties*)

2742-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Waylok Air Conditioning Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all plumbers and plumbers’ apprentices, in the employ of Waylok Air Conditioning Limited in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2765-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Joshua Tree Construction Ltd. (Respondent)

Unit: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Joshua Tree Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers’ apprentices, stonemasons and stone-

masons' apprentices in the employ of Joshua Tree Construction Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and all construction labourers in the employ of Joshua Tree Construction Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2846-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. J & K Stone Masonry Specialists (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of J & K Stone Masonry Specialists in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of J & K Stone Masonry Specialists in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2880-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. 944302 Ontario Inc. c.o.b. as Euro Masonry Unlimited (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of 944302 Ontario Inc. c.o.b. as Euro Masonry Unlimited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of 944302 Ontario Inc. c.o.b. as Euro Masonry Unlimited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and all construction labourers in the employ of 944302 Ontario Inc. c.o.b. as Euro Masonry Unlimited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2886-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Joe F. Canadian Masonry Ltd. (Respondent)

Unit: "all construction labourers in the employ of Joe F. Canadian Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Joe F. Canadian Masonry Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2887-91-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Joe F. Canadian Masonry Ltd. (Respondent)

Unit: "all journeymen and apprentice bricklayers in the employ of Joe F. Canadian Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all

journeymen and apprentice bricklayers in the employ of Joe F. Canadian Masonry Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2906-91-R: International Brotherhood of Electrical Workers Local 586 (Applicant) v. Electricite Pierre Marchand Inc. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of Electricite Pierre Marchand Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Electricite Pierre Marchand Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa- Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2927-91-R: Teamsters Local Union No. 419 (Applicant) v. Laidlaw Technologies Inc. (Respondent)

Unit: “all office and clerical employees of Laidlaw Technologies Inc. in its Medical Services Group in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and sales staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

2977-91-R: Practical Nurses Federation of Ontario (Applicant) v. Pembroke Civic Hospital (Respondent)

Unit: “all employees of Pembroke Civic Hospital employed as registered or graduate nursing assistants by the respondent in the City of Pembroke, Ontario, save and except head nurses and persons above the rank of head nurse” (49 employees in unit) (*Having regard to the agreement of the parties*)

2990-91-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Senator Hotels Limited (Respondent) v. Labourers’ International Union of North America, Ontario Provincial District Council, Labourers’ International Union of North America, Local 493 (Interveners)

Unit: “all carpenters and carpenters’ apprentices in the employ of Senator Hotels Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Senator Hotels Limited in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2999-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Senator Hotels Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervener)

Unit: “all construction labourers in the employ of Senator Hotels Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Senator Hotels Limited in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

3000-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Larry Warner Masonry Ltd. (Respondent)

Unit: “all construction labourers in the employ of Larry Warner Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Larry Warner Masonry Ltd. in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and

institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (17 employees in unit)

3018-91-R: The Ontario Public School Teachers’ Federation (Applicant) v. The Renfrew County Board of Education (Respondent)

Unit: “all school support counsellors employed by The Renfrew County Board of Education in Renfrew County, save and except supervisors, persons above the rank of supervisor, Native School Support Counsellor and persons for whom any trade union held bargaining rights as at December 13, 1991” (20 employees in unit) (*Having regard to the agreement of the parties*)

3030-91-R: International Union Of Operating Engineers, Local 793 (Applicant) v. Regal Forming Ltd. (Respondent)

Unit: “all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the employ of Regal Forming Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the employ of Regal Forming Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

3044-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. 571252 Ontario Ltd. (c.o.b. as the Red Dog Inn, Fort Frances) (Respondent)

Unit: “all Front Desk employees of 571252 Ontario Ltd. c.o.b. as the Red Dog Inn, Fort Frances in the Town of Fort Frances save and except, Supervisors and persons above the rank of Supervisor, Officer Manager and Chefs” (6 employees in unit) (*Having regard to the agreement of the parties*)

3078-91-R: The Ontario Public School Teachers’ Federation (Applicant) v. The Timmins Board of Education (Respondent)

Unit: “all Teacher Assistants and monitors employed by The Timmins Board of Education in the City of Timmins, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as at December 20, 1991” (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3083-91-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Lincoln County Roman Catholic Separate School Board (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: “all employees employed as General Assistants, Special Learning Class (2) and Special Assistants for the Lincoln County Roman Catholic Separate School Board in the County of Lincoln, Ontario, save and except persons in bargaining units for which any trade union held bargaining rights as of December 20, 1991” (48 employees in unit)

3096-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. The Brick Warehouse Corporation (Respondent)

Unit: “all employees of The Brick Warehouse Corporation at 1352 Dufferin Street in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (31 employees in unit) (*Having regard to the agreement of the parties*)

3126-91-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. 822815 Ontario Inc. o/a LOEB Parkways West (Respondent)

Unit: “all meat department employees of 822815 Ontario Inc. o/a LOEB Parkways West in the City of Missis-

sauga, save and except Department Managers, persons above the rank of Department Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

3133-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 822815 Ontario Inc. o/a Loeb Parkways West (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of 822815 Ontario Inc. o/a Loeb Parkways West in the City of Mississauga, save and except Produce Department Manager, Grocery Department Manager, Service Department Manager, Office Manager, Cash Manager, persons above the rank of Produce Department Manager, Grocery Department Manager, Service Department Manager, Office Manager and Cash Manager, and full-time meat department employees” (170 employees in unit) (*Having regard to the agreement of the parties*)

3172-91-R: London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Alpha Quick Print Limited (Respondent)

Unit: “all employees of Alpha Quick Print Ltd. in Sarnia, save and except supervisors, persons above the rank of supervisor and office and clerical staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

3187-91-R: Ontario Public Service Employees Union (Applicant) v. Madawaska Valley Association for Community Living (Respondent)

Unit #1: “all employees of Madawaska Valley Association for Community Living in the Village of Barry’s Bay, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, office and clerical staff” (11 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of Madawaska Valley Association for Community Living in the Village of Barry’s Bay, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (14 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0095-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. 560742 Ontario Ltd. c.o.b. Canada Framing (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Intervener)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Province of Ontario, save and except non-working foreman and persons above the rank of non-working foreman” (3 employees in unit)

Number of persons listed as eligible	9
Number of persons who cast ballots	7
Number of segregated ballots cast by persons whose names appear on voter’s list	2
Number of segregated ballots cast by persons whose names do not appear on voters’ list	5
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	0
Ballots segregated and not counted	5

2043-90-R: The Ontario Secondary School Teachers’ Federation (Applicant) v. The Essex County Board Of Education (Respondent)

Unit: “all employees of the respondent in the County of Essex, save and except supervisors, persons above the rank of supervisor, director of education, supervisory officers, co-ordinator of caretaking, payroll accountant, health and safety officer, J.E.A.P. co-ordinator, executive secretary to the director of education, secretary to the superintendent of business, assessment officer, manager of computer services, area supervisors,

manager of administrative services, adult worker, manager of plant, benefits secretary, secretary to the superintendent of human resources, human resources secretary, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods, persons employed in a co-operative training program with a school, college, or university and employees in bargaining units for which any trade union held bargaining rights as of November 5, 1990" (27 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons listed as eligible	27
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	10

2262-91-R: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. St. Joseph's Health Centre of London (Respondent)

Unit: "all employees of St. Joseph's, Health Centre of London, save and except registered nurses, undergraduate nurses, supervisors, persons above the rank of supervisor, co-ordinators, technical professional personnel, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (44 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	54
Number of persons who cast ballots	45
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	17

2368-91-R: Service Employees International Union Local 204., Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Women's College Hospital (Respondent) v. Christine Jarvis (Objectors)

Unit: "all office and clerical employees employed by Women's College Hospital in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, Administrative Assistant-Medical, Human Resources Personnel, Library Technicians, Health Record, Technicians, Secretaries to the following: Director Human Resources, Controller, Occupational Health Centre, Physicians in Chief, President, Vice-President, Finance & Administration, Vice-President, Clinical Support Program Vice-President, Medicine/Surgery, Program Vice-President, Perinatal, Program Vice-President, Mental/Community Health, Board of Directors, Executive Director Foundation, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of October 18, 1991" (170 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	169
Number of persons who cast ballots	144
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	138
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	75
Number of ballots marked against applicant	62
Number of ballots segregated and not counted	6

2432-91-R: IWA - Canada (Applicant) v. Standard Paper Box Division of SPB Canada Inc. (Respondent) v. The Canadian Paperworkers Union and its Belleville Local 1335 (Intervener)

Unit: "all hourly rated employees of Standard Paper Box Division of SPB Canada Inc., save and except salaried foremen, persons above the rank of foreman, office and sales staff" (62 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	76
--------------------------------------	----

Number of persons who cast ballots	63
Number of ballots marked in favour of applicant	59
Number of ballots marked in favour of intervener	4

2876-91-R: Hotel Employees Restaurant Employees Union Local 75, (Applicant) v. The Trustees of the Cleary Auditorium (Respondent)

Unit: "all employees of The Trustees of the Cleary Auditorium regularly employed for not more than 24 hours per week in Windsor, save and except supervisors, persons above the rank of supervisor, personal secretaries, office and clerical staff, stage hands and projectionists and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	26
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	4

Applications for Certification Dismissed Without Vote

2282-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Blvd Forming Ltd. (Respondent) (20 employees in unit)

2364-91-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 172 Restoration Steeplejacks (Applicant) v. Belair Restoration (Ontario) Inc., Belair Restoration (Ottawa) Inc. (Respondents) (90 employees in unit)

2842-91-R; 2843-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Hard-Co Excavating Ltd. (Respondent) (9 employees in unit)

3097-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Union Taxi (Respondent) (3 employees in unit)

3213-91-R: Hotel and Restaurant Employees and Bartenders' Union, Local 604, A.F.L. - C.I.O. - C.L.C.. (Applicant) v. Holiday Inns of Canada Ltd. (Peterborough) (Respondent) (21 employees in unit)

3220-91-R: Canadian Union of Public Employees (Applicant) v. Columbus Centre of Toronto (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2868-91-R: United Steelworkers of America (Applicant) v. Bingo Press & Speciality Ltd. c.o.b. as Bazaar & Novelty (Respondent)

Unit: "all employees of the respondent in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (201 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons listed as eligible	213
Number of persons who cast ballots	202
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	199
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	69
Number of ballots marked against applicant	130
Ballots segregated and not counted	3

3019-91-R; 3024-91-R: Ontario Public School Teachers' Federation (Applicant) v. Ottawa Board of Education (Respondent) v. Ontario Secondary School Teachers' Federation (Intervener)

Unit: "all teacher aides employed by Ottawa Board of Education in the City of Ottawa, save and except persons expected to be employed for a term of less than 30 continuous working days, students employed in a co-operative work program, and employees in bargaining units for whom any trade union held bargaining rights as of December 13, 1991" (325 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	347
Number of persons who cast ballots	275
Number of ballots marked in favour of applicant	70
Number of ballots marked in favour of no union	96
Number of ballots marked in favour of second intervener	105
Ballots segregated and not counted	4

Applications for Certification Withdrawn

1961-91-R: International Association of Heat and Frost Insulators, and Asbestos Workers, Local 95 (Applicant) v. J.P.R. Construction (Respondent)

2154-91-R: Teamsters Local Union No. 879 (Applicant) v. Merv Orr's Group Inc./Merv Orr's Transport Driver Training School (Respondents)

2551-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. S & R Car Rentals Toronto (Central) Ltd. (Respondent)

2562-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stanley Acmetrack Limited (Respondent)

2588-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Nu-West Hardwood (Respondent)

2632-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. Prescott and Russell County Roman Catholic Separate School Board/Conseille Scolaire Catholique du Prescott-Russell (Respondent)

2688-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stanley Acmetrack Limited (Respondent)

2706-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stanley Acmetrack Limited (Respondent)

2729-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. S & R Car Rentals Toronto (Central) Ltd. (Respondent)

3039-91-R: Hotel and Restaurant Employees and Bartenders' Union, Local 604, A.F.L. - C.I.O. - C.L.C. (Applicant) v. Holiday Inns of Canada Ltd. (Peterborough) (Respondent)

3046-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Del Property Management Inc. and/or, Concord Square Limited and/or, Lorion Development Group Inc. and/or, Metropolitan Toronto Condominium Corporation No. 821 (M.T.C.C. No. 821) (Respondents)

3047-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Condominium Corporation No. 821 (M.T.C.C. No. 821) and/or Del Property Management Inc. (Respondents)

3135-91-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Norbro Holdings Ltd. c.o.b. Best Western Parkway Inn (Respondent)

3185-91-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Union Made Products (Respondent)

3188-91-R: Canadian Union of Public Employees (Applicant) v. Port Colborne General Hospital (Respondent)

3260-91-R: Registered Nurses of Extendicare Bayview Association (Applicant) v. Extendicare Health Services Inc. (Respondent) v. Canadian Union of Public Employees, Local 1394 (Intervener)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2104-91-FC: Canadian Union of Public Employees and its Local 3501 (Applicant) v. The Boys' Club (Respondent) (*Granted*)

2778-91-FC: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Call-A-Cab Limited (Respondent) (*Withdrawn*)

2943-91-FC: Southern Ontario Newspaper Guild, Local 87 (Applicant) v. The Daily Mercury, A Division of Thomson Newspapers Company Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3275-90-R: United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting Industry of The United States and Canada, Local 463 (Applicant) v. Vincent J. Trudeau & Sons Inc. c.o.b. as Acme Plumbing & Heating and 883553 Ontario Inc. c.o.b. as Acme Bivalent Systems (Respondents) (*Granted*)

0869-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Resource Construction Ltd. and, Heinzcraft Custom Woodwork Ltd. (Respondents) (*Granted*)

1485-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Canporita Forming Limited and, Ereddia Forming Limited (Respondents) (*Withdrawn*)

1551-91-R: National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1411 (Applicant) v. Roamer Boat Works Inc. and, Barry Bergey and, SeaRay of Ontario Sales (Respondents) (*Withdrawn*)

1918-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. 450928 Ontario Limited o/a Olympic Mechanical (Respondents) (*Withdrawn*)

1955-91-R: Sheet Metal Workers' International Association, Local 235 (Applicant) v. 450928 Ontario Ltd. c.o.b. as Olympic Mechanical (Respondents) (*Withdrawn*)

2202-91-R: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lay-All Drywall Ltd., and Jonsmeg Drywall Limited (Respondents) (*Withdrawn*)

2518-91-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. J.P. Fournier and Cofastec Inc. (Respondents) (*Granted*)

2783-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Formcrete Contracting Ltd. and, Marsedi Construction Limited (Respondents) (*Withdrawn*)

2826-91-R: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and

Joiners of America (Applicant) v. Network Drywall Group Inc. and, Jopal Group Inc. (Respondents) (*Withdrawn*)

2969-91-R: Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. CMC Mausoleum Construction and/or, Carrier Mausoleum Construction Inc. and/or, Les Constructions de Mausolees Carrier Inc. and/or, Muchling Precast & Contracting Limited (Respondents) (*Granted*)

3016-91-R: The Ontario Public Service Employees Union (Applicant) v. The Salvation Army Grace Hospital, Windsor and, Windsor Western Hospital Centre (Respondents) (*Withdrawn*)

3048-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Condominium Corporation No. 821 (M.T.C.C. No. 821) and/or, Del Property Management Inc. (Respondents) (*Withdrawn*)

3049-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Del Property Management Inc. and/or, Concord Square Limited and/or, Lorion Development Group Inc. and/or, Metropolitan Toronto Condominium Corporation No. 821 (M.T.C.C. No. 821) (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3276-90-R: United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting Industry of The United States and Canada, Local 463 (Applicant) v. Vincent J. Trudeau & Sons Inc. c.o.b. as Acme Plumbing & Heating and 883553 Ontario Inc. c.o.b. as Acme Bivalent Systems (Respondents) (*Dismissed*)

0868-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Resource Construction Ltd. and, Heinzcraft Custom Woodwork Ltd. (Respondents) (*Granted*)

1485-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Canporita Forming Limited and, Ereddia Forming Limited (Respondents) (*Withdrawn*)

1551-91-R: National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1411 (Applicant) v. Roamer Boat Works Inc. and, Barry Bergey and, SeaRay of Ontario Sales (Respondents) (*Withdrawn*)

1918-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. 450928 Ontario Limited o/a Olympic Mechanical (Respondents) (*Withdrawn*)

1955-91-R: Sheet Metal Workers' International Association, Local 235 (Applicant) v. 450928 Ontario Ltd. c.o.b. as Olympic Mechanical (Respondents) (*Withdrawn*)

2202-91-R: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lay-All Drywall Ltd., and Jonsmeg Drywall Limited (Respondents) (*Withdrawn*)

2380-91-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Vemax Electrical Contractors Inc. and/or, Rose Technology Group Limited (Respondents) (*Granted*)

2783-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Formcrete Contracting Ltd. and, Marsedi Construction Limited (Respondents) (*Withdrawn*)

2826-91-R: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Network Drywall Group Inc. and, Jopal Group Inc. (Respondents) (*Withdrawn*)

2969-91-R: Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. CMC Mausoleum Construction and/or, Carrier Mausoleum Construction Inc. and/or, Les Constructions de Mausolees Carrier Inc. and/or, Muehling Precast & Contracting Limited (Respondents) (*Granted*)

3207-91-R: Ontario Public Service Employees Union (Applicant) v. The Salvation Army Grace Hospital and the, Windsor Western Hospital Centre (Respondents) (*Withdrawn*)

CROWN TRANSFER ACT

1587-91-R: Ontario Liquor Boards Employees' Union (Applicant) v. D.F.S. Canada Ltd., The Liquor Control Board of Ontario (Respondents) (*Withdrawn*)

3017-91-R: Ontario Public Service Employees Union (Applicant) v. The Ontario Teachers' Pension Plan Board (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1205-91-R: Everett MacCulloch (Applicant) v. Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Respondent) v. Racal-Chubb Canada Inc. (Intervener)

Unit: "all employees of Racal-Chubb Canada Inc. at its facility located at 42 Shaft Road in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (26 employees in unit) (*Dismissed*)

Number of persons listed as eligible	20
Number of persons who cast ballots	17
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	12

2135-91-R: Robert Chevalier (Applicant) v. Syndicat International des Mécaniciens de machines fixes (Respondent)

Unit: "tous les employés affectés à la section reprographie (catégorie R) de la gestion des formulaires et reprographie à l'Université d'Ottawa à l'exception des superviseurs, des employés de bureau, des personnes travaillant régulièrement un maximum de vingt-quatre (24) heures par semaine et des étudiants embauchés au cours des vacances scolaires" (10 employees in unit) (*Granted*)

Number of persons listed as eligible	10
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	6

2222-91-R: Don Snow and, Keith Wood (Applicants) v. Canadian Paperworkers Union and its Local 309 (Respondent) v. Domtar Packaging, A Division of Domtar Inc. (Keele Plant) (Intervener)

Unit: "all its employees including maintenance staff, located at 7700 Keele Street in Concord, Ontario, save and except foremen, persons above the rank of foreman, office, sales office, stock clerk and security officers" (140 employees in unit) (*Granted*)

Number of persons listed as eligible	162
Number of persons who cast ballots	140
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	139
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of respondent	30

Number of ballots marked against respondent

106

2490-91-R: Vito Carnovale (Applicant) v. Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees and Bartenders' International Union (Respondent) v. Brunswick Tavern (Intervener)

Unit: "all full-time and part-time male and female employees employed in the beverage departments in the licensed establishment at 481 Bloor Street West in the Municipality of Toronto hereto as tapmen, bartenders, beverage waiters (including waiters who operate automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic beverages" (12 employees in unit) (*Dismissed*)

Number of persons listed as eligible	11
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	6

2597-91-R: Elizabeth McCullough and all Staff Children's Castle Day Care Centre Ltd. (Applicant) v. Canadian Union of Public Employees Local 2204 (Respondent) v. Children's Castle Day Care Centre Limited (Intervener)

Unit: "all its employees in the City of Ottawa, save and except head teacher, persons above the rank of head teacher, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Granted*)

Number of persons listed as eligible	13
Number of persons who cast ballots	12
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	11

2603-91-R: William Woodland (Applicant) v. Canadian Union of Public Employees (Respondent) v. Credit Valley Conservation Authority (Intervener)

Unit: "all its employees in the City of Ottawa, save and except head teacher, persons above the rank of head teacher, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Dismissed*)

Number of persons listed as eligible	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

2736-91-R: Karen E. Gregus (Applicant) v. United Food and Commercial Workers Local 175/633 (Respondent) v. Abbott Laboratories Ltd. (Intervener)

Unit: "all technical employees employed at Abbott Laboratories Limited in the City of Brockville, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of April 17, 1989" (6 employees in unit) (*Granted*)

Number of persons listed as eligible	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	6

3054-91-R: Craig Lauritzen and the Warehouse and Service Personnel (Applicant) v. International Brotherhood of Teamsters Union Local #419 (Respondent) v. SEB Canada Inc. (Intervener) (6 employees in unit) (*Granted*)

3222-91-R: Employees of T.C.C. Bottling Ltd., Chatham, Ontario c.o.b. as Coca-Cola Bottling (Applicant) v. Teamsters Local Union 938 (Respondent) v. T.C.C. Bottling Ltd. (c.o.b. as Coca-Cola Bottling) (Intervener) (21 employees in unit) (*Granted*)

3393-91-R: Eleanor Wotherspoon and other employees (Applicant) v. United Food & Commercial Workers International Union, Region 18, AFL CIO CLC on behalf of its Local 617P (Respondent) (*Withdrawn*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

0877-91-M: International Union of Operating Engineers, Local 793 (Applicant) v. Enterprises Vibec Inc. (Respondent) (*Dismissed*)

2897-91-M: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Allard Construction of Ontario Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3222-90-U: The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the Electrical Contractors Association of Toronto (Complainants) v. International Brotherhood of Electrical Workers, Local 353, Joe Fashion, Bob Gill & Bill Martindale and others, (Respondent) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3104-89-U: National Automobile, Aerospace And Agricultural Implement Workers Union of Canada (C.A.W. - Canada) and its Local 1987 (Complainant) v. Pembra Inc. (Respondent) (*Withdrawn*)

3135-89-U: International Brotherhood of Electrical Workers Local 105 (Complainant) v. Wm. J. Davidson Electric Inc. (Respondent) (*Granted*)

0755-90-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Royal Homes Limited (Respondent) (*Granted*)

0978-90-U: The United Brotherhood of Carpenters and Joiners of America Local 3054, Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters And Joiners of America (Complainants) v. Royal Homes Limited (Respondent) (*Granted*)

1241-90-U: International Association Of Machinists And Aerospace Workers, Local Lodge 2413 (Complainant) v. Allcap Baggage Services Inc., Clinton Blake, Paul Blake, Owen Parker, Windsor Mullings (Respondents) (*Dismissed*)

1302-90-U: Sheldon Smith (Complainant) v. James White (Respondent) v. Clarke Transport (Intervener) (*Dismissed*)

1827-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Call-A-Cab (Respondent) (*Dismissed*)

2119-90-U: Hotel Employees Restaurant Employees Union, Local 75 (Complainant) v. Commonwealth Hospitality Limited (Respondent) (*Withdrawn*)

2785-90-U; 3364-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. David Chapman's Ice Cream Limited (Respondent) (*Withdrawn*)

2813-90-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Havlik Technologies Inc. (Williams Machines Division) (Respondent) (*Granted*)

3389-90-U: Alain Gilles, Michel Thouin, et Martine Tremblay (Complainants) v. Collège Universitaire de Hearst (Respondent) (*Withdrawn*)

0874-91-U: William Gerald Campney (Complainant) v. Canadian Autoworkers Union Local 222 (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)

1178-91-U: Service Employees Union, Local 478 (Complainant) v. South Centennial Manor Home For The Aged (Respondent) (*Withdrawn*)

1334-91-U: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1036 (Complainants) v. Sault College of Applied Arts and Technology (Respondent) (*Withdrawn*)

1424-91-U: Susan Reda (Complainant) v. The Hotel Employees Restaurant Employees Union, Local 75, Toronto (Respondent) (*Dismissed*)

1591-91-U: National Automobile, Aerospace And Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Havlik Technologies Inc. (Respondent) (*Withdrawn*)

1708-91-U: Labourers' International Union Of North America, Local 183 (Complainant) v. Empire Maintenance Industries Inc. (Respondent) (*Withdrawn*)

1808-91-U: National Automobile, Aerospace And Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Havlik Technologies Inc. (Respondent) (*Withdrawn*)

1912-91-U: Mr. Leonard Coulter (Complainant) v. Amalgamated Transit Union Local 1573 (Respondent) (*Dismissed*)

2174-91-U: Angello Malamas (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75 (Respondent) v. Chestnut Park Hotel (Intervener #1) v. Hathe Beim (Intervener #2) (*Dismissed*)

2218-91-U: Pipeline Contractors Association of Canada (Complainant) v. Premier Murphy - A Joint Venture (Respondent) (*Withdrawn*)

2235-91-U: Canadian Guards Association (Complainant) v. Carleton University (Respondent) (*Withdrawn*)

2321-91-U: Angello Malamas (Complainant) v. Heather Beim Personnel Administrator, Chestnut Park Hotel (Respondents) (*Withdrawn*)

2396-91-U: United Steelworkers Of America (Complainant) v. Ideal Plumbing Group Inc. (Respondent) (*Withdrawn*)

2429-91-U: George Garnavos (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75 (Respondent) (*Withdrawn*)

2534-91-U: (Sheldon) Andrew Smith (Complainant) v. James White, (business representative) Teamsters Local 938. (Respondent) (*Dismissed*)

2538-91-U: United Steelworkers of America (Complainant) v. International Discus Corporation (Respondent) (*Withdrawn*)

2556-91-U: Int'l Beverage Dispensers' and Bartenders' Union Local 280 (Complainant) v. Queensbury Arms (Respondent) (*Withdrawn*)

2593-91-U: Association of Professional Student Services Personnel, Toronto Chapter (Complainant) v. Toronto Board Of Education (Respondent) (*Withdrawn*)

2600-91-U: Retail, Wholesale And Department Store Union AFL:CIO:CLC (Complainant) v. Call-A-Cab Limited (Respondent) (*Withdrawn*)

2745-91-U: Ontario Public Service Employees Union (Complainant) v. Community Living Timmins Integration Communautaire (Respondent) (*Withdrawn*)

2746-91-U: Ontario Public Service Employees Union (Complainant) v. Community Living Timmins Integration Communautaire (Respondent) (*Withdrawn*)

2759-91-U: David Barnett (Complainant) v. Canadian Auto Workers Local 199 (Respondent) (*Withdrawn*)

2772-91-U: Gerald B. Nolk (Complainant) v. Service Employees International Union Local 532 (Respondent) (*Withdrawn*)

2774-91-U: United Food and Commercial Workers International Union, Local 175 (Complainant) v. Food Warehouse (Respondent) (*Withdrawn*)

2777-91-U: Tanya Craig (Complainant) v. Local 203 United Glass & Consumer Glass Workers, Consumers Glass (Respondents) (*Granted*)

2801-91-U: Kenneth Lynch (Complainant) v. Teamsters Local 879, Canadian Freightways (Respondents) (*Withdrawn*)

2803-91-U: Michael Archer (Complainant) v. Boeing of Canada De Havilland Division, CAW TCA Local 673 C.A.W. (Respondents) (*Withdrawn*)

2804-91-U: Earl Mallia (Complainant) v. Nabet Local 72 (Respondent) (*Withdrawn*)

2810-91-U: Premier Murphy - A Joint Venture (Complainant) v. Pipe Line Contractors Association of Canada (Respondent) (*Withdrawn*)

2811-91-U: Matt Mandziak (Complainant) v. CUPE Local 1328, Metro Sep. School Board, Jan Rowen, President, Noleen Gakvey, Chief Steward (Respondents) (*Withdrawn*)

2814-91-U: Niagara Health Care and Service Workers Union Local 302 affiliated with the Christian Labour Association of Canada (Complainant) v. Caduceus Living Centres (Fort Erie) Limited Partnership c.o.b. as Residence on Garrison Road (Respondent) (*Withdrawn*)

2816-91-U: Mary Anne Green (Complainant) v. The National Automobile, Aerospace, & Agricultural Implementation Workers Union of Canada (C.A.W.- Canada) (Respondent) (*Withdrawn*)

2817-91-U: Mary Anne Green (Complainant) v. General Motors of Canada (Respondent) (*Withdrawn*)

2857-91-U: United Steelworkers Of America (Complainant) v. SWF Auto-Electric, A Division of ITT Industries of Canada Ltd. (Respondent) (*Withdrawn*)

2860-91-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Complainant) v. Relax Inn Limited c.o.b. as Relax Plaza Hotel Airport (Respondent) (*Withdrawn*)

2867-91-U: Bertha Anbarsoun (Complainant) v. United Steelworkers of America &, Walbar Canada Inc. (Respondents) (*Withdrawn*)

2874-91-U: Rhonda Douglas (Complainant) v. Ontario Nurses Association &, Simcoe County District Health Unit (Respondents) (*Withdrawn*)

2885-91-U: Service Employees' Union, Local 210 (Complainant) v. Western Cafe, Auxiliary of Windsor Western Hospital Centre (Respondent) (*Withdrawn*)

2892-91-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Cambridge Interiors International Inc. (Respondent) (*Withdrawn*)

2900-91-U: United Food and Commercial Workers International Union, Local 175/633 (Complainant) v. LOEB Sandalwood Square (Respondent) (*Withdrawn*)

2911-91-U: Teamsters Local Union 419 (Complainant) v. Western Automotive Warehousing Limited (Respondent) (*Withdrawn*)

2959-91-U: The Ontario Public Service Employees Union (Complainant) v. Larch/Northern Radiological Services Ltd. (Respondent) (*Withdrawn*)

2993-91-U: Acid Plant Group (Complainant) v. Mine, Mill & Smelter Workers Union Loc. 598 (Respondent) (*Withdrawn*)

3091-91-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 and Teamsters Local Union 938, (Complainants) v. Quinte Transport (1986) Limited (Respondent) (*Withdrawn*)

3002-91-U: National Automobile, Aerospace And Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Siemens Automotive Limited/Ram Air Division (Respondent) (*Withdrawn*)

3003-91-U: Hotels, Clubs, Restaurants, Taverns, Employees Union, Local 261 (Complainant) v. Talisman Motor Inn (Respondent) (*Withdrawn*)

3011-91-U; 3221-91-U: United Food & Commercial Workers International Union, Local 175/633 (Complainant) v. E.B. Eddy Mills Cafeteria C.O.B. as Rainbow Foods (Respondent) (*Withdrawn*)

3015-91-U: Daniel Arias (Complainant) v. Pathex International Ltd (Respondent) (*Withdrawn*)

3028-91-U: Hotel Motel And Restaurant Employees Union, Local 442 (Complainant) v. 717482 Ontario Inc. c.o.b. Steak and Burger Restaurant and, Iqbal Mussa (Respondents) (*Withdrawn*)

3034-91-U: Warren Mcivor (Complainant) v. Union Local 597 (Respondent) (*Withdrawn*)

3040-91-U: George Walton (Complainant) v. Can-Truck Ltd and, C.B.R.T. Union (Respondents) (*Withdrawn*)

3058-91-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Resource Construction Ltd. and, Heinzcraft Custom Woodwork Ltd. (Respondents) (*Granted*)

3077-91-U: Ontario Public Service Employees Union - Local 707 (Complainant) v. Avenue II - Community Programs Services, Thunder Bay, Incorporated (Respondent) (*Withdrawn*)

3085-91-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Geiger International Ltd. (Respondent) (*Withdrawn*)

3086-91-U: Ontario Secondary School Teachers' Federation, District 53 (Complainant) v. Haldimand Board of Education (Respondent) (*Withdrawn*)

3094-91-U: Phyllis Harrison (Complainant) v. Service Employees International Union Local 532 (Respondent) (*Withdrawn*)

3104-91-U: Mr. Azim Babu Ramji (Complainant) v. Royal York Hotel &, Hotel & Restaurant Local Union 75 (Respondents) (*Withdrawn*)

3136-91-U: Textile Processors, Service Trades, Health Care, Professional And Technical Employees International Union, Local 351 (Complainant) v. Norbro Holdings c.o.b. as Best Western Parkway Inn (Respondent) (*Withdrawn*)

3138-91-U: Istvan Lorincz, G. Balogh, B. S. Mancoo, M. Ponnuthurai, K. Elliott, L. St. Bernard, P. Reddy and, D. Arias, H. Belanger (Complainants) v. Pathex International Ltd. (Respondent) (*Withdrawn*)

3143-91-U: Jacqueline Smyth (Complainant) v. Amalgamated Clothing & Textile Workers Union Textile Joint Board, Kitchener (Respondent) (*Withdrawn*)

3149-91-U: Jean-Marc R Sabourin (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

3159-91-U: Vincenzo Lunghi (Complainant) v. Zentil Plumbing & Heating Contracting Ltd. (Respondent) (*Dismissed*)

3174-91-U: (Sheldon) Andrew Smith (Complainant) v. Mr. Wayne Schnieder (foreman, supervisor) (Respondent) (*Dismissed*)

3175-91-U: (Sheldon) Andrew Smith (Complainant) v. John Done, (Health And Safety Manager), Clarke Transport (Respondents) (*Dismissed*)

3214-91-U: Ernie Derrett (Complainant) v. Simpson Plant Council (Union), A.G. Simpson Co. Ltd. (Respondents) (*Withdrawn*)

3240-91-U: John Lucescu (Complainant) v. Marsh Engineering Ltd. (Respondent) (*Dismissed*)

3263-91-U: Greg Darnell and, Stephen Bossence (Complainants) v. Western Fair Association (Respondent) (*Dismissed*)

3474-91-U: United Food and Commercial Workers International Union, Local 175 (Complainant) v. LOEB Central Parkway West, Mississauga, Ontario and, LOEB Head Office (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3014-91-M: Tillsonburg and District Association for Community Living (Applicant) v. Ontario Public Service Employees Union and its of Local 115 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

1797-91-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 221 (Applicant) v. International Union of Operating Engineers, Local 793 -and-, Robert LaFramboise Mechanical Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1606-91-M: Family Services Association of Metropolitan Toronto (Applicant) v. Ontario Public Service Employees Union and its Local 594 (Respondent) (*Withdrawn*)

1707-91-M: S.E.I.U. Local 268 (Applicant) v. Plummer Memorial Public Hospital (Respondent) (*Withdrawn*)

2100-91-M: The Canadian Hearing Society (Applicant) v. Canadian Union of Public Employees and its Local 2073 (Respondent) (*Withdrawn*)

2592-91-M: Ontario Public Service Employees Union (Applicant) v. Donwood Institute (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2568-90-OH: Georgia Lindsay (Complainant) v. Make-Up Art Cosmetics Limited (Respondent) (*Dismissed*)

2662-90-OH: Ronald Gerald Tisler (Complainant) v. The Township of Matchedash Council (Respondent) (*Dismissed*)

2890-90-OH: Graham Beckmann (Complainant) v. E & D Services Corp. (Respondent) (*Dismissed*)

1812-91-OH: Roger Kennedy (Complainant) v. Whitler Industries Limited (Respondent) (*Granted*)

2141-91-OH: Ken Gervais (Complainant) v. Inco Limited, Copper Cliff Copper Refinery Electrowinning Dept. & foreman (Respondent) (*Withdrawn*)

2815-91-OH: Mary Anne Green (Complainant) v. General Motors of Canada (Oshawa Plant) (Respondent) (*Withdrawn*)

2945-91-OH: Modesto Petitti and, Local 7480 United Steelworkers of America (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2946-91-OH: Guido Di Fruscia and, Local 7480 United Steelworkers of America (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2947-91-OH: Merle Hill and, Local 7480 United Steelworkers of America (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2948-91-OH: Mauro Desantis and, Local 7480 United Steelworkers of America (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2949-91-OH: Peter Frey and, Local 7480 United Steelworkers of America (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2950-91-OH: Alfred Lundy and, Local 7480 United Steelworkers of America (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2951-91-OH: Mario Patierno and, United Steelworkers of America Local 7480 (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2952-91-OH: Wayne Baldwin and, Local 7480 United Steelworkers of America (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2953-91-OH: John Pitters and, Local 7480 United Steelworkers of America (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2954-91-OH: Wayne Cowan and, Local 7480 United Steelworkers of America (Complainants) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1967-89-G: Labourers' International Union Of North America, Local 493 (Applicant) v. Steds Limited (Respondent) (*Dismissed*)

2250-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Entreprises Vibec Inc. (Respondent) (*Dismissed*)

2586-90-G: International Brotherhood of Painters and Allied Trades Local 1904 (Applicant) v. C.H. Heist Ltd. (Respondent) (*Withdrawn*)

3281-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ideal Railings Ltd. (Respondent) (*Dismissed*)

0204-91-G: Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007 (Applicant) v. E. S. Fox Limited (Respondent) (*Granted*)

0567-91-G: Labourers' International Union of North America, Local 837 (Applicant) v. Ellis Don Construction (Respondent) (*Withdrawn*)

0867-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Resource Construction Ltd. and, Heinzcraft Custom Woodwork Ltd. (Respondents) (*Granted*)

1050-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mollenhauer Limited (Respondent) (*Withdrawn*)

1093-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Robert Laframboise Mechanical Ltd. (Respondent) (*Withdrawn*)

1365-91-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Newman Construction Inc. (Respondent) (*Withdrawn*)

1720-91-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. The Electrical Power Systems Construction Association, C.A. Tedesco Waterproofing (Respondents) (*Withdrawn*)

1907-91-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. The Electrical Power Systems Construction Association, Landmark Mechanical Ltd. (Respondents) (*Withdrawn*)

1942-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Limited (Respondent) (*Withdrawn*)

1944-91-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494 (Applicant) v. National Painting & Decorating Corporation (Respondent) (*Withdrawn*)

1954-91-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. G & N Mechanical Ltd., 450928 Ontario Ltd. c.o.b. as Olympic Mechanical (Respondents) (*Withdrawn*)

1969-91-G; 2251-91-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Nicholls Radtke & Associates Ltd. (Respondent) v. Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244 (Intervener) (*Dismissed*)

1979-91-G: Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Withdrawn*)

2103-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Tiger Enterprises Inc. (Respondent) (*Withdrawn*)

2248-91-G: United Association of Journeymen and Apprentices with the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. 538580 Ontario Ltd. o/a G-N Mechanical Sheet Metal (Respondents) (*Withdrawn*)

2254-91-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Nicholls Radtke & Associates Ltd. (Respondent) (*Dismissed*)

2294-91-G: Labourers' International Union of North America, Local 1059 (Applicant) v. The John Hayman & Sons Company Limited (Respondent) (*Withdrawn*)

2336-91-G: Labourers International Union of North America, Local 506 (Applicant) v. Rise Excavating & Sodding (Respondent) (*Granted*)

2494-91-G: United Brotherhood of Carpenters and Joiners of America Local Union 1256 (Applicant) v. Day-bue Contracting Limited (Respondent) (*Withdrawn*)

2540-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Nichols Radtke Ltd. (Respondent) (Endorsed Settlement)

2541-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. M.B.B. Mechanical Services Limited (Respondent) (*Withdrawn*)

2554-91-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Co. (Respondent) (*Granted*)

2704-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dineen Construction Limited (Respondent) (*Granted*)

2727-91-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Technique-Environment Corp. (Respondent) (*Granted*)

2794-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dawn Enterprises Inc. (Respondent) (*Granted*)

2795-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dalv Construction Ltd. (Respondent) (*Granted*)

2821-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Toronto Housing Labour Bureau ("the Bureau") and Lakeview Estates Limited ("Lakeview") (Respondents) (*Granted*)

2853-91-G: Ironworkers District Council of Ontario (Applicant) v. Terron Mechanical Limited (Respondent) (*Granted*)

2877-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. B. Gerlach and Son Enterprises Inc. (Respondent) (*Granted*)

2896-91-G: Labourers' International Union of North America, Local 527 (Applicant) v. Greenspoon Brothers Limited (Respondent) (*Withdrawn*)

2905-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bramalea Limited (Respondent) (*Withdrawn*)

2921-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Wee Crane Truck Services (A subsidiary of Oakview Developments Inc.) (Respondent) (*Granted*)

2924-91-G; 2925-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Paving Construction Limited (Respondent) (*Granted*)

2930-91-G: Labourers International Union of North America, Local 607 (Applicant) v. Premier Murphy - a joint venture (Respondent) (*Withdrawn*)

2941-91-G: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. The Jackson-Lewis Company Inc. (Respondent) (*Withdrawn*)

2982-91-G: Bricklayers, Masons Independent Union of Canada - Local 1 (Applicant) v. Luso Canadian Masonry Co. Ltd. (Respondent) (*Granted*)

2995-91-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. The Parent Company (Respondent) (*Granted*)

2997-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric (Respondent) (*Withdrawn*)

3010-91-G: Bricklayers, Masons Independent Union of Canada - Local 1 (Applicant) v. Metric Masonry Amalgamated Limited (Respondent) (*Granted*)

3037-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. G.L.D. Systeme Interieur (Respondent) (*Withdrawn*)

3038-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Val-Po Ent., Les Construction (Respondent) (*Withdrawn*)

3069-91-G: International Union of Operating Engineers and it's Local 793 (Applicant) v. Quinte Crane Rental Inc. (Respondent) (*Withdrawn*)

3070-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. West Front Construction Ltd. (Respondent) (*Granted*)

3073-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Union Interlocking Stone Inc. (Respondent) (*Granted*)

3080-91-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Cosar Contractors Limited and/or, Lambton Metal Works Ltd. (Respondents) v. United Association Of Journeymen And Apprentices Of The Plumbing And Pipefitting Industry Of The United States And Canada, Local Union 663 (Intervener) (*Withdrawn*)

3100-91-G: Labourers' International Union of North America, Local 247 (Applicant) v. Eastern Concrete Drilling a Division of 862851 Ontario Limited (Respondent) (*Granted*)

3106-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Campbell Cox Limited (Respondent) (*Granted*)

3114-91-G: Sheet Metal Workers' International Association Local No. 30 (Applicant) v. Millway Mechanical Inc. (Respondent) (*Granted*)

3117-91-G: Sheet Metal Workers' International Association Local No. 30 (Applicant) v. P.W. Mechanical Ltd. (Respondent) (*Granted*)

3118-91-G; 3119-91-G: Sheet Metal Workers' International Association Local No. 30 (Applicant) v. G.B. Metals Limited (Respondent) (*Granted*)

- 3121-91-G:** Sheet Metal Workers' International Association Local No. 30 (Applicant) v. G T Sheet Metal Limited (Respondent) (*Granted*)
- 3124-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Lindsay Brothers Construction Ltd. (Respondent) (*Granted*)
- 3125-91-G:** Labourers' International Union of North America Local 1089 (Applicant) v. Ontario Hydro (Respondent) (*Withdrawn*)
- 3129-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Toddbrook Carpentry Ltd. (Respondent) (*Granted*)
- 3140-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. S. H. Carpentry Ltd. (Respondent) (*Withdrawn*)
- 3141-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. W. G. Carpentry Limited (Respondent) (*Withdrawn*)
- 3145-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Kerstone Contractors Limited (Respondent) (*Granted*)
- 3146-91-G:** Resilient Floor Workers Local 2965, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bridgeview Broadloom and Rugs (Respondent) (*Granted*)
- 3154-91-G:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Pinehurst Interior Contractors (Respondent) (*Withdrawn*)
- 3155-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Campbell & Kennedy (Respondent) (*Withdrawn*)
- 3156-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. 709631 Ontario Inc. (c.o.b. as Sir Forming) (Respondent) (*Granted*)
- 3157-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. G. Torno Engineering (Respondent) (*Withdrawn*)
- 3161-91-G:** International Association of Heat and Frost Insulators and Asbestos Workers Local 95 (Applicant) v. Master Clad Inc. (Respondent) (*Withdrawn*)
- 3164-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Geranium Enterprises Limited (Respondent) (*Withdrawn*)
- 3165-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Dundas Iron and Steel Ltd. (Respondent) (*Withdrawn*)
- 3170-91-G:** Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Allard Construction of Ontario Limited (Respondent) (*Withdrawn*)
- 3197-91-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Binks Manufacturing Company of Canada Limited (Respondent) (*Withdrawn*)
- 3205-91-G:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Baron Insulation Limited (Respondent) (*Granted*)
- 3212-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Cana-Drain Services Inc. (Respondent) (*Granted*)

3224-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. B.B.S. Construction Ltd. (Respondent) (*Granted*)

3227-91-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. Bramalea Iron Works (Respondent) (*Granted*)

3229-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Dennison Electric Supply (Respondent) (*Granted*)

3230-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric (Respondent) (*Granted*)

3231-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Bhattal Electric (Respondent) (*Granted*)

3237-91-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Dutchman Boiler Removal Inc. (Respondent) (*Granted*)

3238-91-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. Durso Steel Limited (Respondent) (*Granted*)

3250-91-G: International Brotherhood of Painters and Allied Trades Local 1795 Glaziers (Applicant) v. Whyte Glass Ltd. (Respondent) (*Granted*)

3269-91-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Lay-All Dry-wall Ltd. (Respondent) (*Granted*)

3272-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carwood Store Fixtures Limited (Respondent) (*Withdrawn*)

3273-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Union Interlocking Stone Inc. (Respondent) (*Dismissed*)

3287-91-G: International Association of Bridge, Structural & Ornamental Ironworkers Local 759 (Applicant) v. Murillo Iron Works (Respondent) (*Withdrawn*)

3290-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. J.C. Electrical, Division of 948641 Ontario Limited (Respondent) (*Granted*)

3363-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Unique Trim Limited (Respondent) (*Withdrawn*)

3364-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Conformco Inc. (Respondent) (*Withdrawn*)

3365-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Murphy Construction (Respondent) (*Granted*)

3410-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. M & M Installation (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0066-90-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Turn-Key Installations Inc. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

1302-90-U: Sheldon Smith (Applicant) v. James White (Respondent) (*Dismissed*)

1827-90-U: Retail, Wholesale And Department Store Union (Applicant) v. Call-A-Cab (Respondent) (*Dismissed*)

2336-90-G: Sheet Metal Workers' International Association Local 30 (Applicant) v. Dufferin Roofing Limited (Respondent) (*Withdrawn*)

2994-90-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Automotive Plastic Technologies, Inc. (Respondent) (*Dismissed*)

3028-90-R: Robin Thibault (Applicant) v. Service Employees Union, Local 268 (Respondent) v. Plummer Memorial Public Hospital (Intervener) (*Dismissed*)

3281-90-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ideal Railings Limited (Respondent) (*Terminated*)

3348-90-R: Plummer Hospital Technical Unit Part-Time c/o Margaret Rafter (Applicant) v. Service Employees Union, Local 268 (Respondent) v. Plummer Memorial Public Hospital (Intervener) (*Dismissed*)

3364-90-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. David Chapman's Ice Cream Limited (Respondent) (*Withdrawn*)

0784-91-R: Canadian Guards Association (Applicant) v. Ottawa Congress Centre/Centre de Congress D'Ottawa (Respondent) (*Granted*)

1994-91-R: Plummer Hospital Technical Unit Part-Time c/o Margaret Rafter (Applicant) v. Service Employees Union, Local 268 (Respondent) v. Plummer Memorial Public Hospital (Intervener) (*Dismissed*)

2504-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. J. P. Fournier and, Confastec Inc. (Respondents) (*Granted*)

2534-91-U: (Sheldon) Andrew Smith (Complainant) v. Teamsters, Local Union 938 (Respondent) v. Clarke Transport (Intervener) (*Dismissed*)

2535-91-R: George Moody (Applicant) v. Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 49 (London) Ontario (Respondent) v. Webster Air Equipment (Intervener) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

20N
2
054

ONTARIO LABOUR RELATIONS BOARD REPORTS

March 1992



ONTARIO LABOUR RELATIONS BOARD

<i>Chair</i>	M.G. MITCHNICK
<i>Alternate Chair</i>	R.O. MACDOWELL
<i>Vice-Chairs</i>	M. BENDEL
	J.B. BLOCH
	L. DAVIE
	N.V. DISSANAYAKE
	O.V. GRAY
	B. HERLICH
	R.J. HERMAN
	R.D. HOWE
	J. JOHNSTON
	B. KELLER
	P. KNOPF
	S. LIANG
	J. McCORMACK
	M.A. NAIRN
	K. O'NEIL
	K. PETRYSHEN
	N.B. SATTERFIELD
	I.M. STAMP
	G. SURDYKOWSKI
	S.A. TACON

Members

J. ANDERSON	W.S. O'NEILL
B.L. ARMSTRONG	D.A. PATTERSON
C.A. BALLENTINE	H. PEACOCK
W.A. CORRELL	R.W. PIRRIE
K.S. DAVIES	F.B. REAUME
A.R. FOUCAULT	J. REDSHAW
W.N. FRASER	K.V. ROGERS
P.V. GRASSO	J.A. RONSON
A. HERSHKOVITZ	M.A. ROSS
M. JONES	J.A. RUNDLE
J. KENNEDY	G.O. SHAMANSKI
H. KOBRYN	R.M. SLOAN
J. KURCHAK	E.G. THEOBALD
J. LEAR	J. TRIM
D.A. MacDONALD	M. VUKOBRAT
W.J. McCARRON	S. WESLAK
C. McDONALD	W.H. WIGHTMAN
R.R. MONTAGUE	N.A. WILSON
J.W. MURRAY	D.G. WOZNIAK

<i>Registrar</i>	T.A. INNISS
<i>Board Solicitors</i>	R. LEBI
	K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1992] OLRB REP. FEBRUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1.	Cambridge Reporter, The, A Division of Canadian Newspapers Company Limited; Re Southern Ontario Newspaper Guild, Local 87	271
2.	Cara Operations Limited; Re Rosetta Luciani; Re H.E.R.E., Local 75 of the H.E.R.E.	295
3.	Cor Jesu Re-education Centre of Timmins Inc., Centre de Rééducation Cor Jesu de Timmins Inc.; Re U.S.W.A.	298
4.	Cybermedix Health Services Limited; Re O.P.S.E.U.	308
5.	Municipality of Metropolitan Toronto, The; Re O.N.A. and S.E.I.U., Local 204; Re C.U.P.E., Local 79	315
6.	National Elevator and Escalator Association; Re I.U.E.C., Locals 50, 90 and 96.....	345
7.	Polytech Coatings Limited; Re C.A.W.; Re Group of Employees	362
8.	Romatt Custom Woodwork Inc.; Re C.J.A., Local 27	377
9.	Siteco Electric Ltd. and Leo Alarie and Sons Limited; Re I.B.E.W.; Re I.U.O.E., Local 793	383
10.	TheatreCorp Ltd., and WGC Facility Management Corporation and Theatremark Ltd.; Re I.A.T.S.E., Local 58, Toronto.....	388

COURT PROCEEDINGS

1.	National Plastic Profiles Inc. and Ontario Labour Relations Board; Re Steve Szeghalmi	408
----	---------------------------------------------------------------------------------------------	-----

SUBJECT INDEX

- Adjournment - Practice and Procedure - Unfair Labour Practice - Union counsel requesting adjournment because he had only been retained the day before - In the circumstances, Board not satisfied that last-minute change of counsel warranting adjournment - Board concluding that neither employer's decision to change grievor's shift, nor its provision of written instructions to grievor improperly motivated - Complaint dismissed
- CYBERMEDIX HEALTH SERVICES LIMITED; RE O.P.S.E.U. 308
- Certification - Construction Industry - Employee on training course held not "at work" in the unit for purposes of the count - Board rejecting argument that four employees at work in proposed bargaining unit on the application date should be included on list of employees even though they were not qualified pursuant to *Trades Act* to work in the electrician trade - Board holding that even if lawfully employed, the four employees would share no real community of interest with the journeymen and apprentice electricians
- SITECO ELECTRIC LTD. AND LEO ALARIE AND SONS LIMITED; RE I.B.E.W.; RE I.U.O.E., LOCAL 793..... 383
- Certification - Employer - Related Employer - First respondent operating theatre complex under agreement with complex owner - Other respondents, amongst others, using complex under licence for producing or presenting theatrical productions - Respondents under common control or direction - Respondents asserting that they carry on businesses separately but in a related enterprise - Common employer declaration issuing - Board, however, finding the "producer" rather than "the house" to be the employer of the stagehands dispatched from the union's hiring hall - Board determining that for purposes of "the count" in this industry, the employee complement is that which exists on the application date - As there were no employees of the named respondents at work in the bargaining unit at the time the application was made, certification application dismissed
- THEATRECORP LTD., AND WGC FACILITY MANAGEMENT CORPORATION AND THEATREMART LTD.; RE I.A.T.S.E., LOCAL 58, TORONTO..... 388
- Certification - Union requesting that it be provided with copy of employee list in advance of Officer meeting - Employer agreeing to union's request so long as it permitted to see union's Form 9 at the same time - Board reviewing history of employee list issue and describing development of Board's regional certification program and expanded "waiver" program - Board explaining how waiver Officer now typically provides union with copy of the list after parties' positions on bargaining unit description identified - Board concluding that expanded form of "waiver" process affording Board means of striking more complete balance with respect to parties' competing concerns, while serving broader interests of economy and efficiency for community at large
- COR JESU RE-EDUCATION CENTRE OF TIMMINS INC., CENTRE DE RÉÉDUCATION COR JESU DE TIMMINS INC./; RE U.S.W.A. 298
- Charges - Evidence - Intimidation and Coercion - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert evidence on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that conduct of union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing
- POLYTECH COATINGS LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES 362

Construction Industry - Certification - Employee on training course held not “at work” in the unit for purposes of the count - Board rejecting argument that four employees at work in proposed bargaining unit on the application date should be included on list of employees even though they were not qualified pursuant to <i>Trades Act</i> to work in the electrician trade - Board holding that even if lawfully employed, the four employees would share no real community of interest with the journeymen and apprentice electricians SITECO ELECTRIC LTD. AND LEO ALARIE AND SONS LIMITED; RE I.B.E.W.; RE I.U.O.E., LOCAL 793.....	383
Construction Industry - Duty to Bargain in Good Faith - Unfair Labour Practice - Whether union breaching the duty to bargain by insisting that there be one collective agreement and one seniority list for construction work and non-construction work in the elevator industry in the province, and by refusing Association’s request that union sign the same non-ICI agreement it had signed with some individual employers - Whether subsequent collective agreement removing grounds for the complaint proceeding - Complaint dismissed NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION; RE I.U.E.C., LOCALS 50, 90 AND 96	345
Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer’s witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of <i>Occupational Health and Safety Act</i> to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board’s interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI.....	408
Duty to Bargain in Good Faith - Construction Industry - Unfair Labour Practice - Whether union breaching the duty to bargain by insisting that there be one collective agreement and one seniority list for construction work and non-construction work in the elevator industry in the province, and by refusing Association’s request that union sign the same non-ICI agreement it had signed with some individual employers - Whether subsequent collective agreement removing grounds for the complaint proceeding - Complaint dismissed NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION; RE I.U.E.C., LOCALS 50, 90 AND 96	345
Employer - Certification - Related Employer - First respondent operating theatre complex under agreement with complex owner - Other respondents, amongst others, using complex under licence for producing or presenting theatrical productions - Respondents under common control or direction - Respondents asserting that they carry on businesses separately but in a related enterprise - Common employer declaration issuing - Board, however, finding the “producer” rather than “the house” to be the employer of the stagehands dispatched from the union’s hiring hall - Board determining that for purposes of “the count” in this industry, the employee complement is that which exists on the application date - As there were no employees of the named respondents at work in the bargaining unit at the time the application was made, certification application dismissed THEATRECOP LTD., AND WGC FACILITY MANAGEMENT CORPORATION AND THEATREMART LTD.; RE I.A.T.S.E., LOCAL 58, TORONTO.....	388
Evidence - Charges - Intimidation and Coercion - Representation Vote - Employer alleging “climate of fear” in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert evidence on Sikh culture and reli-	

gion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that conduct of union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing

POLYTECH COATINGS LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES..... 362

Evidence - Discharge - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness beached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... 408

Evidence - First Contract Arbitration - Board applying *Great Lakes Community Credit Union* case and declining to hear evidence of amended negotiating position made after application date - Board satisfied that employer's bargaining positions with respect to union security and foremen doing bargaining unit work taken without reasonable justification - Board also satisfied that refusal to recognize the bargaining authority of the trade union underlying employer's position in bargaining - Board directing arbitration of first collective agreement

ROMATT CUSTOM WOODWORK INC.; RE C.J.A., LOCAL 27 377

First Contract Arbitration - Despite exhaustive negotiations and prolonged strike, parties unable to arrive at a collective agreement - Board determining that parties unable to disentangle themselves from pressures, limitations and agendas not derived from collective bargaining process itself - In the circumstances, logjam warranting Board's intervention - Board directing first contract arbitration under section 41(2)(d)

CAMBRIDGE REPORTER, THE, A DIVISION OF CANADIAN NEWSPAPERS COMPANY LIMITED; RE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87..... 271

First Contract Arbitration - Evidence - Board applying *Great Lakes Community Credit Union* case and declining to hear evidence of amended negotiating position made after application date - Board satisfied that employer's bargaining positions with respect to union security and foremen doing bargaining unit work taken without reasonable justification - Board also satisfied that refusal to recognize the bargaining authority of the trade union underlying employer's position in bargaining - Board directing arbitration of first collective agreement

ROMATT CUSTOM WOODWORK INC.; RE C.J.A., LOCAL 27 377

Health and Safety - Discharge - Evidence - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness beached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... 408

Intimidation and Coercion - Charges - Evidence - Representation Vote - Employer alleging “climate of fear” in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert evidence on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that conduct of union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees’ true wishes - Request for new vote denied - Certificate issuing	
POLYTECH COATINGS LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES	362
Judicial Review - Discharge - Evidence - Health and Safety - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer’s witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of <i>Occupational Health and Safety Act</i> to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness beached rules of natural justice and that Board’s interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court	
NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI.....	408
Natural Justice - Discharge - Evidence - Health and Safety - Judicial Review - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer’s witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of <i>Occupational Health and Safety Act</i> to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness beached rules of natural justice and that Board’s interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court	
NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI.....	408
Practice and Procedure - Adjournment - Unfair Labour Practice - Union counsel requesting adjournment because he had only been retained the day before - In the circumstances, Board not satisfied that last-minute change of counsel warranting adjournment - Board concluding that neither employer’s decision to change grievor’s shift, nor its provision of written instructions to grievor improperly motivated - Complaint dismissed	
CYBERMEDIX HEALTH SERVICES LIMITED; RE O.P.S.E.U.	308
Practice and Procedure - Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer’s witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of <i>Occupational Health and Safety Act</i> to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness beached rules of natural justice and that Board’s interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court	
NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI.....	408
Related Employer - Certification - Employer - First respondent operating theatre complex under agreement with complex owner - Other respondents, amongst others, using complex under licence for producing or presenting theatrical productions - Respondents under common control or direction - Respondents asserting that they carry on businesses separately but in a	

related enterprise - Common employer declaration issuing - Board, however, finding the “producer” rather than “the house” to be the employer of the stagehands dispatched from the union’s hiring hall - Board determining that for purposes of “the count” in this industry, the employee complement is that which exists on the application date - As there were no employees of the named respondents at work in the bargaining unit at the time the application was made, certification application dismissed

THEATRECORP LTD., AND WGC FACILITY MANAGEMENT CORPORATION
AND THEATREMART LTD.; RE I.A.T.S.E., LOCAL 58, TORONTO.....

388

Remedies - Sale of a Business - Unfair Labour Practice - Nursing home’s nurses represented by ONA - Metro Toronto’s employees represented by CUPE in all-employee unit - Metro Toronto purchasing nursing home - Board observing that in two-union intermingling situations, it may give less weight to pre-existing status quo and employee preferences, and exhibit more concern about problems of fragmentation and establishment of sensible bargaining arrangements in new business context - Board declining to preserve nurses’ bargaining unit at nursing home and declaring that CUPE represents the nursing home’s employees, including the former ONA nurses - Board remaining seized with respect to effective date of declaration - Board dismissing unfair labour practice complaint based on failure of employer to treat new hires and transferees as coming under the ONA collective agreement

MUNICIPALITY OF METROPOLITAN TORONTO, THE; RE O.N.A. AND
S.E.I.U., LOCAL 204; RE C.U.P.E., LOCAL 79

315

Representation Vote - Charges - Evidence - Intimidation and Coercion - Employer alleging “climate of fear” in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert evidence on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that conduct of union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees’ true wishes - Request for new vote denied - Certificate issuing

POLYTECH COATINGS LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES.....

362

Sale of a Business - Remedies - Unfair Labour Practice - Nursing home’s nurses represented by ONA - Metro Toronto’s employees represented by CUPE in all-employee unit - Metro Toronto purchasing nursing home - Board observing that in two-union intermingling situations, it may give less weight to pre-existing status quo and employee preferences, and exhibit more concern about problems of fragmentation and establishment of sensible bargaining arrangements in new business context - Board declining to preserve nurses’ bargaining unit at nursing home and declaring that CUPE represents the nursing home’s employees, including the former ONA nurses - Board remaining seized with respect to effective date of declaration - Board dismissing unfair labour practice complaint based on failure of employer to treat new hires and transferees as coming under the ONA collective agreement

MUNICIPALITY OF METROPOLITAN TORONTO, THE; RE O.N.A. AND
S.E.I.U., LOCAL 204; RE C.U.P.E., LOCAL 79

315

Termination - Applicant making second termination application in two months - Board dismissing earlier application because less than forty-five per cent of employees had signed statement of desire in support of it - Union asking Board to dismiss second application with a bar - Board satisfied that representation issue not truly determined in first application - Union’s motion dismissed by Board

CARA OPERATIONS LIMITED; RE ROSETTA LUCIANI; RE H.E.R.E., LOCAL 75
OF THE H.E.R.E.

295

Unfair Labour Practice - Adjournment - Practice and Procedure - Union counsel requesting

adjournment because he had only been retained the day before - In the circumstances, Board not satisfied that last-minute change of counsel warranting adjournment - Board concluding that neither employer's decision to change grievor's shift, nor its provision of written instructions to grievor improperly motivated - Complaint dismissed	
CYBERMEDIX HEALTH SERVICES LIMITED; RE O.P.S.E.U.	308
Unfair Labour Practice - Construction Industry - Duty to Bargain in Good Faith - Whether union breaching the duty to bargain by insisting that there be one collective agreement and one seniority list for construction work and non-construction work in the elevator industry in the province, and by refusing Association's request that union sign the same non-ICI agreement it had signed with some individual employers - Whether subsequent collective agreement removing grounds for the complaint proceeding - Complaint dismissed	
NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION; RE I.U.E.C., LOCALS 50, 90 AND 96	345
Unfair Labour Practice - Remedies - Sale of a Business - Nursing home's nurses represented by ONA - Metro Toronto's employees represented by CUPE in all-employee unit - Metro Toronto purchasing nursing home - Board observing that in two-union intermingling situations, it may give less weight to pre-existing status quo and employee preferences, and exhibit more concern about problems of fragmentation and establishment of sensible bargaining arrangements in new business context - Board declining to preserve nurses' bargaining unit at nursing home and declaring that CUPE represents the nursing home's employees, including the former ONA nurses - Board remaining seized with respect to effective date of declaration - Board dismissing unfair labour practice complaint based on failure of employer to treat new hires and transferees as coming under the ONA collective agreement	
MUNICIPALITY OF METROPOLITAN TORONTO, THE; RE O.N.A. AND S.E.I.U., LOCAL 204; RE C.U.P.E., LOCAL 79	315
Witness - Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of <i>Occupational Health and Safety Act</i> to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court	
NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI.....	408

2858-91-FC Southern Ontario Newspaper Guild, Local 87, Applicant v. The Cambridge Reporter, a Division of Canadian Newspapers Company Limited, Respondent

First Contract Arbitration - Despite exhaustive negotiations and prolonged strike, parties unable to arrive at a collective agreement - Board determining that parties unable to disentangle themselves from pressures, limitations and agendas not derived from collective bargaining process itself - In the circumstances, logjam warranting Board's intervention - Board directing first contract arbitration under section 41(2)(d)

BEFORE: Sherry Liang, Vice-Chair, and Board Members R. M. Sloan and P. V. Grasso.

APPEARANCES: L. A. Richmond, Margaret Leighton, Bill Petrie and Frances Soboda for the applicant; F. G. Hamilton, Jon C. Butler, Allan R. Weir and Christina Jonas for the respondent.

DECISION OF THE BOARD; March 26, 1992

1. This is an application made pursuant to section 41 of the *Labour Relations Act*. On February 21, 1992, the Board issued the following endorsement:

In this application under section 41 [formerly 40a] of the *Labour Relations Act*, the Board hereby directs the settlement of a first collective agreement by arbitration. Our reasons for this direction will follow.

2. These are our reasons for the direction. For ease of reference, the applicant will also be referred to throughout as "the union" or "the Guild". The respondent will also be referred to as "the Reporter", "the employer" or "the company".

3. This application was received by the Board on November 29, 1991 and was heard over the course of 12 days concluding on February 11, 1992. The application was originally scheduled to be heard on December 10, 18 and 23. On the first day of hearing, the parties spent most of the day attempting to negotiate a settlement. This effort having failed, we convened late in the day to hear the applicant's request to schedule additional hearing days in this application for the weekend of December 21 and 22. The Board declined that request, but did set additional hearing dates for December 24 and 31, which were consented to by the parties. During the course of these hearings, further dates were scheduled as necessary.

The Evidence

4. The respondent is a newspaper which is part of the Thomson Newspapers Company group of newspapers. Thomson Newspapers is one of three companies which make up the Thomson Corporation. The other two companies are Thomson Travel and Thomson Information Publishing. Each of the presidents of these three corporations reports to the president of Thomson Corporation, who in turn reports to a Board of Directors. The Thomson family holding corporation is the largest single shareholder in the Thomson Corporation, but the corporation also has shares offered through the Toronto Stock Exchange. Thomson Newspapers has annual sales of about \$1.2 billion, and includes some 220 individual newspapers. Each newspaper has a publisher. At the Reporter, Jon Butler is the publisher and general manager.

5. On April 27, 1990, this Board issued an interim certificate to the applicant for the following unit:

all employees of the respondent in its Cambridge Reporter Division in the City of Cambridge, save and except publisher, advertising manager, managing editor, city editor, *assistant city editor*, circulation manager, accountant, *lifestyles editor*, *sports editor*, *business editor*, *weekend extra editor*, *specialty magazine manager*, *classified supervisor*, *assistant circulation manager*, *total market coverage manager*, *confidential clerk*, *payroll clerk*, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, students employed in a co-operative training programme and employees in bargaining units for which any trade union held rights as of April 5th, 1991.

6. The underlined positions remained in dispute between the parties and the Board appointed a labour relations officer to inquire into the duties and responsibilities of these employees. Including the disputed positions, the bargaining unit consists of some 40-50 employees. The Guild gave notice to bargain on July 26, 1990, and the first meeting between the parties was convened on September 18. Between September 18, 1990 and November 7, 1991 the parties met on approximately 31 occasions. On the morning of November 7, 1991, negotiations broke down and following that a strike commenced, which continued through the course of this proceeding.

7. Around the same time that the Guild was certified for a unit of Reporter employees, it also received an interim certificate from the Board with respect to a unit of employees at the Guelph Daily Mercury ("the Mercury"), also a division of Thomson Newspapers. The course of bargaining between the Guild and the Mercury has paralleled the bargaining between the Guild and the Reporter, with the employees at the Mercury also presently on strike.

Negotiations to July 28, 1991

8. Frances Soboda and William Petrie were the spokespersons for the Guild and both gave evidence with respect to this period of the negotiations. The company's representatives were Jon Butler, who also gave evidence and Patrick Melady, an independent labour consultant. Ms. Soboda joined the Guild as a local representative on September 1, 1990. One of the major duties assigned to Ms. Soboda upon joining the Guild was the task of negotiating the first collective agreement with the Reporter. For the first six negotiation meetings with the Reporter, both Ms. Soboda and William Petrie, a long time local representative of the Guild, were present at the bargaining table. After the sixth meeting, on November 26, 1990, until the meeting of July 29, 1991, Ms. Soboda was the chief spokesperson for the Guild at the Reporter negotiations. In the final months of negotiations, Mr. Petrie became involved again as chief spokesperson for the Guild, until the strike began on November 7, 1991.

9. The Guild seeks to rely on certain complaints of unfair labour practices filed against both the Reporter and the Mercury. On February 23, 1990, the Guild filed a complaint against the Mercury alleging violations of the Act, by its failure to pay bonuses under a profit sharing plan to certain employees. This complaint was settled by a Memorandum of Settlement dated May 9, 1990. In this settlement, the Mercury agreed to pay the 1990 bonus payment. On June 13, 1990, the Guild filed a complaint against the Reporter alleging failure to pay similar bonuses to employees of the Reporter. This complaint resulted in a Memorandum of Settlement dated August 27, 1990 in which the Reporter also agreed to pay employees an amount equal to their 1990 bonus payment.

10. On May 31, 1990, the Guild filed further complaints against both the Reporter and the Mercury regarding the alleged failure to pay promised wage increases to employees. These complaints were scheduled to be heard together. On November 8, 1990, during the hearing of these complaints, counsel for the Reporter and the Mercury read a prepared statement to the Board. Part of this statement is as follows:

When the Respondent was advised that certain of its employees in Guelph and in Cambridge had requested representation by a Union, the Respondent implemented a policy whereby the wages and benefits of the employees involved were fixed i.e. frozen at the levels and amounts then existing.

This was a conscious decision based on the Respondent's interpretation and understanding of the applicable legislation which stipulates, among other things, that neither wages nor working conditions shall be altered. This decision was also in keeping with the Respondent's past practice at other locations under similar circumstances.

The Respondent acknowledges that for a number of years it has carried on a pattern of discretionary salary reviews, performed regularly but on a variable frequency for different employees, ranging from a maximum of four times yearly to a minimum of once yearly, most commonly twice a year. Salary adjustments may include a general increase and a merit component and are both subject to an assessment of satisfactory performance on the part of the employee.

The Respondent now understands that its employees at Guelph and Cambridge and the Union have requested a reinstatement of this practice. The Respondent further understands that doing so would be in keeping with recent decisions of the Board.

The Respondent is therefore prepared to reinstate the salary review pattern. It will proceed with such a review for all employees, including the delivery of retroactive adjustments for 1990 where appropriate and will continue with such reviews in the future unless and/or until such time as a ratified collective agreement produces some different method.

11. As a result of further discussions on that day, the parties agreed to adjourn the rest of the hearings. Ms. Soboda testified as to the understanding reached on November 8 between the Guild, the Reporter and the Mercury. There are some contradictions between her account and the account of Colin Morley, who testified on behalf of the Reporter on these matters. Mr. Morley was counsel for the two newspapers at the hearings into the unfair labour practice complaints. We do not find it necessary to resolve these contradictions for the purposes of our decision. Ms. Soboda also testified that the complaints had a demoralizing effect on the union's bargaining committee and on the membership. In her mind, the length of time taken to resolve the matters demonstrated to her that Thomson Newspapers would be prepared to "push us to the wall" in any of its dealings with the Guild, and that it was hoping that the Guild would "go away". In the Guild's opinion, the process of settling the unfair labour practice complaints between the Guild and the Reporter and Mercury demonstrated a tactic on the part of Thomson Newspapers of forcing the union to spend money to litigate issues in order to send a message to the union that it would continue to conduct its business in whatever way it wished, despite the two certifications. In Mr. Butler's evidence, there was no such motive on the part of the Reporter. As publisher he took action based on his understanding of the law, then settled the complaints in good faith and in a not untimely manner.

12. The Guild also relied on incidents during negotiations which in its view demonstrated the same sort of attitude on the part of Thomson Newspapers. In one of the early sessions, Jon Butler notified the Guild that certain people on the bargaining committee would be called into the office the next morning to be dealt with. Upon discussion, the issue turned out to involve one employee who had left work early to attend a meeting of the bargaining committee. After some further discussion, the issue was resolved. No action was taken with respect to the employee and the parties arrived at an understanding as to leaving work early for the purposes of bargaining. The evidence of Ms. Soboda and Mr. Petrie was that the incident was intimidating and threatening to the employees involved in bargaining. The Guild's view was that the manner in which Mr. Butler raised the issue was designed to intimidate the employees present. In Mr. Butler's evidence, he raised the issue at the bargaining meeting as a result of a complaint from one of the department

heads with respect to a particular employee. He met with Ms. Soboda privately and resolved the issue in a few minutes. He saw no lasting effects from the incident on the progress of bargaining.

13. After some five meetings during which the parties reviewed the union's first proposal, the company presented its own package on November 26, 1990. There is some dispute as to the positions taken at this meeting. In the Guild's evidence, the company took the position that the union's proposals were now "off the table" and that the Reporter intended to work only from the company document from that point on. Ms. Soboda stated that this announcement came as a shock to the union's bargaining committee. The effect was demoralizing, and the union saw it as another attempt by management to send a message that it intended to maintain control.

14. The Reporter's evidence was that it gave no such message. There was a discussion at this meeting regarding the value of categorizing the parties' proposals into monetary versus non-monetary issues. The Guild requested that the parties caucus in order to categorize the proposals into these groups of issues. In Mr. Butler's evidence, the company only categorized its own proposals, on the understanding that each party was to deal with its own document, whereas apparently the Guild intended both parties to categorize both sets of proposals. In the respondent's position, the Guild misunderstood the company's intentions, and misread the incident to mean that the company was refusing to discuss the Guild proposals from that point onward. At this meeting, the Guild informed the company of its intention to file a request for a conciliation officer. It was the Guild's hope that at the very least, an officer would assist in getting the parties to agree on a procedure for bargaining. The company opposed this on the basis that it was premature. Ultimately, an officer was appointed. The parties met on one more occasion before meeting with the conciliation officer, wherein the company agreed to the union's demand to categorize the union's proposals into monetary and non-monetary issues.

15. Upon resuming negotiations, it appears that the parties came to agreement to commence bargaining with respect to non-monetary issues. Ms. Soboda testified that this was not intended to preclude any bargaining on monetary issues before complete agreement on the non-monetary issues; rather, the intent was to try and settle as much as possible of the non-monetary language first. After November 26, 1990, Mr. Petrie left the Guild's bargaining committee, and did not become involved again until the following summer.

16. Ms. Soboda also testified as to another incident in which Christina Jonas, a member of the Reporter's bargaining team and a managing editor at the newspaper, accused members of the union bargaining committee of abusing sick leave provisions. Ms. Soboda stated that a tense and loud exchange of words occurred between the two parties, and at the conclusion, the union's committee felt demoralized at what it saw as another attempt at intimidation. Ms. Jonas, who testified on behalf of the respondent, denies making such an allegation and states that if there was an exchange of words, it took place as a result of an accusation by the Guild that Mr. Butler feigned illness in leaving the meeting that evening.

17. A further series of incidents testified to by Ms. Soboda concerned remarks at the bargaining table by Jon Butler or Patrick Melady concerning the presence on the union's committee of a number of employees whose status was still in dispute. Ms. Soboda testified that the remarks, which were made on four occasions, were made in a disparaging way, were perceived by the employees as threatening, and were aimed at showing these committee members that management anticipated their eventual exclusion from the bargaining unit. Mr. Butler stated he raised the issue of disputed employees on two occasions. On the first occasion, it was in response to some discussion on other matters which were also before the Labour Board. He stated that he did not have any particular purpose in raising the issue. Mr. Butler testified that Mr. Petrie replied that the par-

ties would deal with the question of exclusions at a later point, and the discussion ended there. Some months later, the company received a notice from the Board regarding new hearing dates on the exclusions issue. As a result of this, Mr. Butler raised the issue again at the bargaining table, pointing out that if the Board were to decide that some of these people were managerial, they would no longer be on the committee.

18. Ms. Soboda also gave evidence on a number of the proposals. In her evidence, some of the proposals by the company were unorthodox and signaled to her an unwillingness to bargain in good faith. One example cited was a bereavement leave proposal in which the company would have discretion to require an employee to provide proof of relationship to the deceased person and proof of attendance at the funeral. This proposal, which was part of the Reporter's first proposal of November 26, 1990, was withdrawn in October of 1991. Another proposal which caused the union concern was a provision entitled "Agreements - Other & Preceding", which reads as follows:

ARTICLE 17 AGREEMENTS - OTHER & PRECEDING

17.1 The Union agrees that this Agreement constitutes the entire Agreement between the parties and that any and all previous Agreements, Supplementary Agreements, Letter of Intent, Understandings, etc., whenever made and whether or not reduced to writing, are hereby cancelled, and that effective upon signing of this Agreement, The Reporter's obligations respecting conditions of employment, working conditions and employee benefits, are limited exclusively to those specifically stated in this Agreement.

19. Ms. Soboda stated that when this was originally proposed, she found it "amazing and alarming". She felt that it was one more attempt by Thomson Newspapers to demonstrate to the employees that joining the union could only work to their detriment. Mr. Butler stated that he understood this language to have been adopted by Mr. Melady from a collective agreement imposed by the Board. The union's response to this proposal was to develop a list of employee benefits which they proposed to add to the agreement. The union's proposal, in the form of a Letter of Agreement, set out certain practices and policies on such matters as receipt of home delivery subscriptions by employees, parking practices and smoking breaks, which would continue during the life of the agreement. The company's response to this proposal was also interpreted by Ms. Soboda as demonstrating a lack of good faith in bargaining. In her evidence, the company specifically asked for a written list of such past practices to be developed by the union, and then categorically refused to consider any of the matters on the list once this was introduced at bargaining. The evidence of Mr. Butler was that most of the matters on this list were monetary in nature and the issue was thus put aside by the company until the parties reached the point of discussing monetary issues in bargaining.

20. A similar incident described by Ms. Soboda concerned the Guild's line by line analysis of the company's management rights proposal. Guild had strong objections to the company's proposal on the basis of its length, breadth and detail. The proposal was contained in an article of approximately four paragraphs. It submitted a document to the company which analyzed the proposal in a very detailed way. Ms. Soboda stated that at least one bargaining session was devoted to debating the management rights proposal, the result of which was that the company agreed to make two language amendments. The changes made did not satisfy the Guild, which felt that they were minor at best. In Mr. Butler's evidence, the company felt that it was responding to what it perceived to be the Guild's major concerns with respect to this article. The management rights proposal remained a divisive issue throughout bargaining.

21. Ms. Soboda testified that the dealings of the parties over the management rights proposal was typical of the course of bargaining. In her view, in many instances, the Reporter's response to thorough preparation and submissions from the Guild was cursory and dismissive.

During the course of bargaining, in her evidence, the company's manner of proceeding was to constantly re-submit its proposals, or make only the most minor of changes. Mr. Butler's evidence was in stark contrast. In his view, the pattern of bargaining was that the union wanted to force the company to make counter-proposals to the company's own proposals. He testified that on any given issue, the company would give its response to an article and the union's response was to basically re-submit its original proposal and look for a further company response.

22. Further, as much as Ms. Soboda objected to the content of some of the company's proposals, Mr. Butler also felt that many of the union's proposals were unrealistic and unreasonable. He stated that many of the proposals appeared to be directed to a much larger newspaper than the Reporter, and appeared to have little relation to the Reporter's actual operations. He also testified as to certain changes which were made to Guild proposals during the course of bargaining. For example, one of the issues between the parties was the time limit for referring matters to arbitration. In Mr. Butler's evidence, the Guild's position started at 90 days, changed to 60 days then 45, and then went back to 90 days again. He stated that this caused frustration amongst the company negotiators, particularly in light of the Guild's accusations that the company was not bargaining in good faith. Another example he gave concerned the negotiations over exclusions to the bargaining unit. Offers had been made by the company on this issue. In the final meetings between the parties, the Guild raised for the first time that they wished to have the position of confidential secretary included in the unit.

23. The parties are agreed that very little progress was made between November 26, 1990 and September of 1991. Both parties point to the other's bargaining style and strategy as a reason for the lack of progress. In Ms. Soboda's evidence, the company's tactic in bargaining involved an insistence on negotiating the entire agreement at each meeting. In her view, just as the parties appeared close to agreement on one article, Mr. Melady insisted on moving on to another provision. This manner of proceeding made it difficult to bargain to a conclusion on any of the issues. The Guild concluded from this, from the proposals themselves, and the other incidents outlined, that the Reporter was not genuinely interested in reaching a collective agreement.

24. Mr. Butler, on the other hand, stated that it was his opinion that the Guild was "looking for something to go wrong". He had concluded, for example, that the union had made its decision to go to conciliation even before receiving the company offer of November 26, 1990. In his testimony, almost from the beginning of bargaining, the union began to accuse the company negotiators of bargaining in bad faith and deliberately slowing down the process. He stated that the impression this left with him was that the union felt that "if they said it enough, someone would believe it". It was also his view that the Guild's bargaining approach hindered progress. His impression of the meetings between the end of November 1990 and July 1991 was that the union refused to cover a broader range of issues until the first four articles of the agreement had been settled. In his evidence, the company on several occasions requested that the parties deal with more proposals, in order to increase the number of issues that could be "traded off", and the union refused.

Negotiations from September 17, 1991 to November 6, 1991

25. In about June of 1991, the union made a decision to re-involve Mr. Petrie in the bargaining. It was decided that Mr. Petrie would seek to persuade the company to bring Jerry Brown into the negotiations as well on behalf of the Reporter. Mr. Brown is a member of the Thomson Newspapers human resources department. The hope of the Guild was that Mr. Brown would be able to assist with the negotiations both at the Reporter and at the Mercury, which were still ongoing. Mr. Petrie had experience negotiating with Mr. Brown at The Oshawa Times, another Thom-

son newspaper. He met with Mr. Brown in July of 1991 and suggested that Mr. Brown and he become directly involved in the bargaining. The Thomson Newspapers human resources director as well as Mr. Butler agreed to this. Mr. Butler stated that in agreeing to Brown's involvement, he was hoping that this would break the impasse.

26. From September of 1991 to the day the negotiations broke off, Mr. Petrie and Mr. Brown were the chief spokespersons for the union and the company respectively. Ms. Soboda was still present at the bargaining table, although a few key meetings between the parties in the early morning of November 7 did not involve her. Mr. Melady was no longer at the bargaining table for the company.

27. From September of 1991, when Mr. Petrie and Mr. Brown became involved in bargaining, until negotiations were discontinued, greater progress was made, with agreement on a number of provisions reached. However, the union was concerned that some of the most important issues remained outstanding. Some of these were union security, management rights, "Agreements - Other and Preceding" and wages. The union was concerned that on the issue of wages, the employer had not yet submitted a proposal that might let the union know the extent of the differences between the parties. Mr. Petrie asked Mr. Brown for a monetary proposal. The response from Mr. Brown was that the parties would not be getting to the issue of wages until near the end of bargaining. As a result of its perception that bargaining was once again slowing down, the union decided to request a no-Board report. Mr. Petrie informed Mr. Brown of this, stating that once this was done and deadlines set, things would inevitably move faster. Again, Mr. Petrie asked for the company's wage proposal. Mr. Brown responded that the company would be tabling its wage proposal at further bargaining meetings scheduled between the parties. The no-Board report was issued on October 21. Mr. Petrie testified that in further discussions with Mr. Brown at this time, Mr. Brown stated that the way he saw it was that if things were to break down, the obstacles would probably be in the areas of wages, union security and management rights. Mr. Brown indicated his opinion that it looked as though there was a good possibility there would be a strike. He stated to Mr. Petrie that the above were the areas of possible breakdown, but he would have to check with head office to see if they wanted to risk losing the Cambridge market by taking on a strike. On October 21, 1991, a "no-Board" report was issued. A strike deadline was set for 12:01 a.m. on November 7.

November 7, 1991

28. The parties had further negotiating meetings on October 23, October 28, November 1, November 4, and November 6. The union had told the company that as long as the parties were still negotiating, there would be no strike. Discussions were held through the night of November 6 and into the morning of November 7. At about 5:30 a.m. on November 7, Mr. Petrie was informed that the company had a wage proposal that it wished to present. At a meeting between Mr. Butler, the conciliation officer and Mr. Petrie, Mr. Butler presented this proposal. The proposal was explained verbally by Mr. Butler, and was also outlined in a document, the text of which is reproduced as follows:

The Cambridge Salary Administration Program will contain the following elements:

A written job description for every position.

A uniform job evaluation system.

A Salary range for every position which will be adjusted annually on the first of each contract year.

semi-annual performance appraisals

semi-annual salary adjustments

Here's how it works.

Every salary range has a mid-point, a minimum, which is 80% of the midpoint and a maximum which is 120% of the mid-point.

Let's consider a hypothetical occupation which has a salary range as shown below:

Minimum	mid-point	maximum
\$400	\$500	\$600

Let's also assume there are four incumbents on this job.

Incumbent A is earning \$425 which is 85% of the mid-point. A is relatively new in the position and is learning quickly.

Incumbent B is earning \$500 per week which is 100% of the midpoint.

Incumbent C is earning \$560 per week which is 112% of the mid-point.

Incumbent D is earning \$400 which is 80% of the mid-point.

At the beginning of the contract year the salary range for all jobs increases 4%. Therefore, the new salary range for our hypothetical job is as follows:

Minimum	Mid-point	Maximum
\$416	\$520	\$624

A is performing beyond expectations and quickly learning all the requirements of the position. During the year, A's salary will be increased to 95% of the new mid-point. These salary adjustments total \$69 per week, an increase of 16%.

B is fully qualified and performing at a competent level. During the year B's salary will be increase [sic] to 100% of the new mid-point. These salary adjustments total \$20 per week, an increase of 4%.

C is fully qualified and is performing at a level well beyond expectations. During the year C's salary will be raised to 115% of the new mid-point. These salary adjustments total \$38 per week, an increase of 7%.

D is new in the position and has not yet made any improvement over entry-level performance. D's salary will stay at 80% of the new mid-point. During the year, D's salary will increase \$16 per week which is an increase of 4%.

In addition, the company gave the union a copy of a document titled "Job Comparison System to Measure Skill, Effort, Responsibility and Working Conditions", which contained a job evaluation system.

29. Mr. Petrie and Mr. Butler gave evidence regarding this meeting which was substantially consistent. Mr. Butler indicated that the employer wished to retain discretion over wages - to ensure that wage increases were related to performance and merit. In the employer's view, the salary administration program proposed would be the process of ensuring this, and would dovetail with the employer's obligations under the Pay Equity Act. Although Mr. Butler stated that some elements were open to negotiation, he also made it clear there would be discretionary increases.

30. During this meeting, Mr. Butler explained that job descriptions for each employee

would be developed in discussions between an employee and his or her supervisor. They would also set goals for the employee to achieve, which would be reviewed semiannually. An employee would be evaluated every 6 months and a decision made by the employer as to whether or not the employee would get an increase and if so, how much. Mr. Butler explained that each job would be placed within a range which contained a mid-point, a minimum at 80% of the mid-point and a maximum at 120%. The company was prepared to negotiate the mid-points with the Guild. The understanding of Mr. Petrie was that the minimum and maximums, however, would be fixed at 80% and 120%. Mr. Petrie asked whether there would be a job and therefore a mid-point for each employee in the bargaining unit. The response from Mr. Butler was that everyone would have their own job description which would be used to set a mid-point. Mr. Butler also indicated that there would be no decrease in salary as a result of implementing the salary administration plan. Mr. Butler testified that it was in this meeting that he indicated the company's proposal to increase the salary ranges by 3%, 3% and 4% over the life of a three-year agreement.

31. Mr. Petrie had a number of questions for Mr. Butler with respect to the proposal. Mr. Butler indicated that he did not know much about the system, and that was why Mr. Weir was present. Thus, following this meeting, there was a further discussion between Mr. Petrie and Al Weir. Again, the evidence of Mr. Petrie and Mr. Weir is substantially consistent with respect to this discussion. In this meeting, Mr. Weir explained the direction in which the corporation was moving in terms of decentralization. He described the key components of the salary administration system as being:

- a) the development of job descriptions as a result of agreement between the incumbent and his or her individual supervisor;
- b) the evaluation of the job as against the job evaluation system prepared by the consultant and
- c) the establishment of objectives and performance criteria for individual employees by discussion and mutual agreement. Finally, the process would include an assessment after the fact as to whether these objectives had been achieved.

32. At this meeting, Mr. Weir indicated areas where the union might have some involvement, such as in negotiating the elements of the job evaluation system which it had proposed. Mr. Petrie states that when he questioned him on the subject of the employer's discretion to determine the rate of pay and an employees' placement relative to the mid-point, Mr. Weir indicated that this was absolutely necessary for the newspaper. He stated that there were changes going on in the newspaper industry, and this was the "wave of the future". In Mr. Petrie's evidence, Mr. Weir told him that the company had lost too many good people over the years. It wanted to be able to keep good people, and this was one way to keep them. He stated that the company intended to implement this system at all of their papers, whether unionized or not.

33. Mr. Weir understood that Mr. Petrie's primary concern with the system was the union's inability under the proposal to tell the employees in the bargaining unit what their salaries would be as a result of negotiations. In a subsequent meeting between Mr. Butler and Mr. Weir, the company concluded that the solution it would offer to that concern was an across-the-board increase of 3% in the first year for all employees.

34. After both parties had meetings with their own caucus, they met again. There is some difference between Mr. Petrie and Mr. Butler as to the events of this meeting. Mr. Petrie stated that Mr. Weir gave what he understood to be the company's bottom line proposal on wages, sub-

ject to agreement on all the other outstanding issues. Mr. Weir stated that he gave no final offer at this meeting. In any event, the company offered a three year agreement. In the first year, it proposed an increase across the board of 3%. The company proposed to implement the salary administration system during the first year. Jobs would be evaluated and mid-points established. In the second and third year, the mid-point would be increased by 3% and 4%. Mr. Petrie states that his impression was that although there might be some movement on details, the concept of pay for performance was a bottom line position. Mr. Petrie stated (and this was also confirmed in the evidence of Mr. Weir) that he asked Mr. Weir specifically whether the company's bottom line was that it would have discretion over the granting of increases to employees in the bargaining unit during the life of the collective agreement, whether there be a traditional grid or some other form of grid. Mr. Weir replied that it was so. At that point, Mr. Petrie indicated that this was unacceptable to the union and the negotiations broke off. In addition to the salary administration system proposal, other outstanding issues which Mr. Petrie identified as being major contributors to the breakdown of negotiations were the company's management rights proposal the company's proposals on "Preceding and Other Agreements", union leave and overtime.

35. Mr. Petrie also recalled that in one of the conversations with Mr. Weir, Mr. Weir acknowledged that although the mid-points for jobs might increase in the second and third year of a contract, the salary of any given employee may remain the same, thus bringing that person lower in the range and as a percentage of the mid-point. As well, he recalled telling the company during these meetings that the Guild's last proposal on wages (which the company had costed as averaging a 12% increase in the first year and 7% increase in the second year) was not their absolute bottom line, although the Guild did not table any different offer during these discussions. Mr. Weir did not recall the union indicating that there was any flexibility on its wage offer. Also, although it is not clear at which meeting this was proposed, during these discussions the company made an offer that as well as 3% and 4% increases to the salary ranges in the second and third years, it would agree to corresponding increases to the total salary budgets in those years.

The Parties' Positions on the Wage Proposal

36. In July of 1991, the Guild had submitted its first wage proposal, which involved the classification of jobs on a grid and annual increases for each classification. Although the parties had agreed to leave negotiations on monetary issues until the latter part of bargaining, in Ms. Soboda's evidence, the union asked the company in January and again in April for its wage proposal. Until November 7, 1991, the company's proposal on wages remained the words "Pay for Performance".

37. When the proposal was presented to it on November 7, the union found it had major concerns with the salary administration system. It is clear that this issue was a primary cause of the ultimate breakdown of negotiations and the commencement of the strike. Taken in conjunction with the other outstanding matters, the union felt matters had reached impasse. The union was taken aback by the late submission of what it considered to be a complex proposal. For example, Ms. Soboda testified that the job evaluation system proposed and on which the company apparently sought the Guild's agreement, was similar to other programs that she has worked with in the context of job evaluation or pay equity. From her experience in negotiating pay equity plans, she estimated that it may take months or years for parties to agree on a job evaluation system and that adjustments are usually made to the system proposed. Mr. Petrie testified that he viewed the proposal as containing not a resolution of issues, but an invitation to continue bargaining during the life of the agreement, without a mechanism to resolve disputes.

38. The union also had major concerns over the substance of the proposal. Some of the concerns identified were: the union would not know an employees' job classification because the

proposal provided for this to be established between an employee and his or her supervisor; there was the possibility that salaries could be decreased upon each performance appraisal (although Mr. Butler had assured them that this would not be the case, the union was concerned that this was a verbal assurance only); the setting of employees' wages was taken out of the union's capacity to negotiate; the system provided for no right of appeal in case of failure to agree on job descriptions or placements. In general, the Guild saw this proposal as leaving them in the unacceptable position of not being able to tell the employees in the unit what their salaries would be after the first year of the agreement. Both Mr. Petrie and Ms. Soboda stressed that, in their view, the issue of wages and the desire to negotiate on wages was one of the major reasons why employees had organized. Nothing in what the company presented to the union alleviated its primary concern to take increases out of the unilateral discretion of the Reporter.

39. Petrie stated that in his experience, it is not unusual in the newspaper industry to have merit pay systems. He has himself negotiated such systems into first collective agreements for the Guild, and understands it to be a feature of most, if not all other Guild contracts. The merit pay systems with which the Guild is familiar allow a company to pay merit pay in its discretion over and above minimum rates of pay established in a wage grid in the collective agreement. Mr. Petrie testified that he explained his understanding to the company and indicated that the Guild would probably not have difficulty with the same type of system in this context. This is confirmed in Mr. Butler's evidence. However, Mr. Petrie also indicated that some form of wage grid was essential, with automatic progression based on service.

40. Mr. Weir's evidence situated the Reporter's proposal within the framework of the Thomson Newspapers organization. As well, Mr. Weir testified as to the relationship of the newspaper and to the corporation, particularly in terms of labour relations. Mr. Weir described the publisher of each newspaper as fulfilling the role that would be that of a president in another business. Essentially, the publisher is responsible for the profit or loss of the business. Each year, the publishers develop business plans for each year in conjunction with head office. Once these plans are approved, the publisher reports to the company only on overall results. Among other things, labour relations is a matter left to individual publishers. Mr. Weir described certain changes which have taken place in Thomson Newspapers over recent years which have led to this relationship between publishers and head office. He stated that in about 1987 to 1988, the revenue from Thomson Newspapers was growing at a lesser rate than it had previously. A decision was made to install a new president, Michael Johnson, whose mandate was to revive the growth of the company. The foundation of Mr. Johnson's approach to this task was to switch the management style of the company from one that is highly centralized to one that is totally decentralized. The decision to make this move was motivated by the success of this approach at the other two companies in Thomson Corporation. Mr. Weir explained this philosophy as "putting authority and decision-making deep down in the organization". In his view, it represents a 180 degree turnaround in management style. Under this approach, the only two key elements of the business that remain centralized are the purchase of newsprint and the provision of capital.

41. Mr. Weir described his own role in Thomson Newspapers Company. Until he was hired, Thomson Newspapers had a labour relations department. He was hired to create an employee relations department, whose primary function is to provide expertise and training to facilitate the decentralized management concept. Although publishers are responsible for handling labour relations at their individual newspapers, the human resource department is involved in providing counsel and advice when asked. In May and again in September of 1991, he met with Mr. Butler to provide him with information on the salary administration system which Towers, Perrins, a management consultant firm had developed for Thomson Newspapers. Mr. Weir testified that he did not have any involvement in the formulation of the Reporter's original proposals in these nego-

tiations. Because his department did not have the staff available to negotiate the Reporter first collective agreement, (which he understood would inevitably take longer than a renewal agreement), he had advised Mr. Butler to retain the services of an outside consultant. In Mr. Weir's testimony, his department took no active role in the negotiations, though it was kept informed of the progress of the negotiations, until the summer of 1991 when he gave permission to Jerry Brown to enter the negotiations. On November 6, since Mr. Weir was the person most knowledgeable about the salary administration system, he attended at the negotiations to explain the system to the parties. He had been informed by Mr. Brown that of the remaining items, this would be the most difficult.

42. Mr. Weir testified as to the development of the salary administration system by Thomson Newspapers. He stated that one of the key components of running a business in a decentralized fashion is the provision of flexibility in compensation and the provision of appropriate awards to people based on their contribution to results. The desire of the corporation is to have a system where compensation is flexible enough to award employees for the job they are doing and the quality of their effort. For these reasons, as well the company's understanding of its obligations to meet the terms of the province's pay equity legislation, Thomson Newspapers hired Towers, Perins to design a compensation program that would address both corporate needs. This consultant worked with a representative sampling of publishers in order to develop the program. Mr. Weir identified the document provided by Mr. Butler to Mr. Petrie describing the salary administration system as a document which had been provided by his department to the publishers.

43. He stated that there are also a number of Thomson newspapers experimenting with a sales commission system based on the same philosophy. The company also intends to introduce similar programs with respect to circulation, and has put into place new bonus programs for management. He stated that "eventually, everyone should have a fair degree of control over their own destiny." It was his opinion that if the company is not successful in these efforts, it will stop growing and eventually become unprofitable and disappear. He stated that "we have to do in about 5 years what the Japanese did in 25". He stated that it is important for the company's employees and the union to agree to the new system because in his opinion, the only way for the corporation to survive in the future is to have compensation structures that encourage contribution based on ability. He agreed with counsel for the applicant in cross-examination that the mandate of every manager within the Thomson Newspaper corporation is to put decentralization in effect. He also agreed that a system of pay which gives increments based on seniority runs counter to the goals of decentralization and thus to the goals of Thomson Corporation and its managers. Mr. Weir also stated that the salary administration system proposed has not yet been made part of any Thomson Newspapers collective agreement.

44. Mr. Weir and Mr. Butler both explained why the wage grid proposed by the union was unacceptable to the company. Mr. Butler testified that in his view, a wage grid is counterproductive because it provides for increases based on service. The company objects to a wage grid even with a discretionary merit component. He stated that under such a system, the company is left to deal with employees through discipline and he is not of the view that discipline is a good way to motivate people. Mr. Weir described the major advantage of the salary administration system as being that nothing determines an employees' income but her or his performance on the job.

45. Mr. Butler stated that in 1990, when he heard of the pay for performance concept from Thomson Newspapers, he decided to include it in his proposals to the Guild. When he made the proposal to the union in November of 1990, he did not know the specifics of this program. At that time, the system was still being completed by Thomson Newspapers. Mr. Butler confirmed that he had several meetings with Mr. Weir, in the spring and summer of 1991, in which he learned the details of the salary administration proposal. He stated that it was his own decision to incorporate

the system into his proposals. In his view, it provides better incentives for employees, and fits in with two other initiatives being tried at the Reporter, involving incentive programs in advertising and circulation.

46. Both Mr. Weir and Mr. Butler stated that as of November 7, the company was prepared to continue to negotiate, and that its last proposal was by no means a final offer. Both stated that they made it clear that the union's role in the system was open to negotiation. In Mr. Weir's view, there is no reason why the parties could not have reached agreement with some further discussion. He anticipated that it would not take more than a few days to reach agreement on the job evaluation system. Both Mr. Weir and Mr. Butler also made it clear that at the end of the day, the company would still insist on discretionary increases.

47. Apparently, during the early part of the negotiations process with the Guild, the Reporter was also negotiating with another union representing composing room employees, the C.W.A. The renewal agreement with the C.W.A., effective from June 1, 1990 to November 30, 1992, was signed on December 4, 1990. This agreement contained a wage grid providing for across-the-board increases on June 1, 1990 and September 1, 1991. Mr. Butler stated that during the negotiations with the C.W.A., the Reporter made no proposal for "pay for performance". He acknowledged in cross-examination that the pay for performance system developed by Thomson Newspapers has not been applied at any of its newspapers to date. He also agreed with counsel for the applicant in cross-examination that the salary administration system could be categorized as "breaking new ground".

48. Mr. Butler's evidence was that the proposal by the company involved a basic system, the implementation of which was to be worked out during the course of the agreement. He acknowledged in cross-examination that if the union had wished to negotiate specific mid-points as of November 7, 1991, the company would not have had the information to do this. The exact figure that will constitute the mid-point in each salary range will be determined during the life of the agreement by a combination of market survey and negotiation with the union. He stated that the company's intent during negotiations was not to negotiate job descriptions or evaluations or mid-points, but to have the collective agreement in place, with agreement to the system, and to have this work done later.

49. At the conclusion of the evidence, counsel for the respondent sought to introduce a number of collective agreements between various unions and employers, unrelated to these parties. Counsel for the union agreed to waive formal proof of these documents, but objected to their admission on the basis of relevance. Counsel agreed to our receipt of these documents subject to argument as to their relevance as part of final argument on the case, and subject to this panel reserving on the issue of their admissibility. Ultimately, no argument was addressed to the admissibility issue and since in any event we do not rely on these documents in our reasons, we make no finding on it.

Argument

50. In final argument, counsel for the applicant submits that the process of collective bargaining between the parties has been unsuccessful because of all the grounds enumerated in section 41(2) [formerly 40a(2)]. Though not limited to the issue of the employer's wage proposal, the applicant's argument focuses on this as crystallizing the issues under section 41(2). Counsel argues that the wage proposal introduced by the Reporter on November 7 was not even a proposal, but an invitation to continue bargaining forever. The proposal demonstrated that the employer intended and was prepared to sit at the table and negotiate as long as it took to ensure that no collective agreement was reached. Rather than accept the invitation to negotiate forever, Mr. Petrie got to

the crux of the matter quickly and determined that there could be no collective agreement with the employer on the basis of its wage proposal, concluding that the employer had no intention of reaching a collective agreement. Counsel states that the employer's wage proposal, along with its positions on other key issues, constitute an effort to undermine the bargaining authority of the union.

51. The applicant's position is that the Reporter's conduct during the settlement of the unfair labour practice complaints also demonstrates a desire to send a message to employees that Thomson Newspapers maintains undiluted authority over their working lives. The delay in settling claims over the violation of the statutory freeze was a deliberate action taken to hit employees in their pocketbooks and lay the blame on the union's certification. In the submissions of counsel, such actions are consistent with the wage proposal ultimately submitted by the Reporter, which seeks to have the union agree in a collective agreement to give total discretion to the employer to decide when, if and how much a wage increase to grant to an its employee.

52. Counsel characterizes other incidents as conveying the same message. In his submission, the purpose of raising the issue of employee exclusions at the bargaining table was to drive home a message to the employees on the negotiating committee. Likewise, the statement regarding the potential discipline of an employee on the committee for leaving work early was designed to intimidate employee members on the committee. These incidents might be forgettable, in his submission, but for the way in which they parallel the essential approach of the employer during bargaining, which was to seek to maintain complete discretion in all important areas of employment and deny the collective authority of the union.

53. Counsel also refers to other positions taken by the employer which have no rational justification and show only an intent to provoke and prolong the discussion. Examples relied on are the employer's position on proof of relationship and attendance at a funeral for bereavement leave purposes, and its position on overtime which the union considered to violate the *Employment Standards Act* (although no specific argument was addressed to this in final submissions).

54. With respect to the wage proposal, the union submits that this was a proposal designed for rejection. The scheme has no place for the union and thus constitutes a refusal by the employer to recognize the bargaining authority of the union. It was made clear to the union that on one key point there was to be no further negotiation - that there was no role for the union in determining wage increases. Further, the proposal was the antithesis of making expeditious efforts. It was clear that although the employer stated that the union could have a role in negotiating mid-points, this was not an exercise it could have or was prepared to engage in at the bargaining table. Also, the employer submitted to the union a job evaluation system which had taken it months to develop, and asked the union to agree to it at the final hour of negotiations.

55. Counsel argues that the employer called its proposal a "new wave" and was unable to point to one newspaper collective agreement, whether or not at Thomson Newspapers, that has incorporated a similar system. As such, this is not a proposal which is reasonable or appropriate to maintain in first contract negotiations.

56. The employer's stated justification for its wage proposal was the concern to keep good people on staff. The union states that this concern could be accommodated through wage grids which provide for merit pay over and above grid rates. The employer's insistence, it is submitted, on an agreement without a grid is uncompromising and unjustified even on its own rationale. The Board is urged to draw the conclusion that the employer's unstated desire is that it does not wish to have a collective agreement that gives a union any collective bargaining authority over wages.

57. Counsel for the applicant also argues that even if the Board does not find that the facts establish the existence of the factors in section 41(2)(a),(b) and (c), it should nevertheless direct a first contract under (d). Counsel states that the timing of the tabling of such a radical and complex salary administration proposal which invited weeks if not years of further bargaining between the parties led to an inevitable breakdown of negotiations. The employer has no real room for negotiation, because its wage proposal is tied to a corporate strategy. The company's new mandate is decentralization. Decentralization and the salary administration system are fundamentally linked. The union, on the other hand, cannot agree to give the employer total discretion in setting wages. The two positions are at complete loggerheads. The corporate mandate is so antagonistic to basic collective bargaining in the industry, that it has caused the failure of collective bargaining.

58. Counsel for the applicant relies on the following cases: *Teamsters Local Union 419 & Crane Canada Inc.*, unreported, July 1, 1988 (M. G. Picher); *United Food and Commercial Workers International Union, Local 174 & Wendy's Restaurants of Canada Inc. Store #365*, [1991] OLRB Rep. October 1241; *Crane Canada Inc.*, [1988] OLRB Rep. Jan. 13; *Formula Plastics Inc.*, [1987] OLRB Rep. May 702; *Co-Fo Concrete Forming Construction Limited*, [1987] OLRB Rep. Oct. 1213; *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005; *Hillview Farms Limited*, [1990] OLRB Rep. May 564; *Peacock Lumber Limited*, [1990] OLRB Rep. May 584; *Arrow Games Inc.*, [1991] OLRB Rep. Jan. 7; *Kraus Carpet Mills Limited*, [1991] OLRB Rep. Jan. 50; *Canada Building Materials Company*, [1990] OLRB Rep. Oct. 1012; *MacMillan Bloedel Building Materials Limited*, [1990] OLRB Rep. Jan. 58; *Knob Hill Farms Limited*, [1991] OLRB Rep. Apr. 521; *Grant Forest Products Corporation*, [1991] OLRB Rep. July 848 and *Courney and Fairbain Ltd. v. Tolaini Brothers (Hotels) Ltd. and another*, [1975] 1 All ER 716 (C.A.).

59. The position of the respondent is that the applicant has caused its own problems in these negotiations. The respondent submits that collective bargaining has not been unsuccessful, and that the union has decided to strike prematurely. Having struck, and failed in its efforts to force the employer to agree to its positions, the applicant should face the consequences of its own miscalculations and return to the bargaining table to complete negotiations. The respondent takes the position that the unduly long period of bargaining was of the Guild's own choosing. The Guild took uncompromising positions without reasonable justifications and failed to make reasonable and expeditious efforts to reach a collective agreement. The respondent submits that the Guild followed a pattern of bargaining which it has applied elsewhere in the past, where it engages in hard bargaining and places itself in a position to take on a strike.

60. Counsel for the respondent submits that the Reporter is not an employer that is seeking to avoid a collective agreement. It has merely endeavoured to negotiate a collective agreement that reflects the operating realities of the Cambridge market. The Reporter has been a party to collective agreements with the C.W.A./I.T.U for some 90 years. Thomson Newspapers has some 200 collective agreements, including some with the Guild. The accusations by the Guild from the beginning of the bargaining process that the Reporter was not bargaining in good faith are not borne out, and in fact reflect the Guild's own strategy of aggressive bargaining.

61. Counsel paints a picture of the economic circumstances in which these negotiations took place, both generally in the Canadian economy and in the newspaper industry, and particularly in the Cambridge market. Against this background, counsel submits that the union's own wage proposal is designed for rejection, in asking for 12% and 7% increases. It is a wage proposal that is unrealistic, and uncompromising.

62. Counsel submits that it was the Reporter's desire throughout to reach a collective agreement. This is demonstrated by its agreement in the summer of 1991 to have Jerry Brown from

Thomson Newspapers become involved in bargaining. This, it is argued, is clear evidence that Thomson Newspapers wants a collective agreement, since it was clear that bargaining was not working well up to then.

63. Counsel characterizes this dispute as a wage dispute pure and simple. What is at issue, he states, is not total discretion or no discretion in setting wages, but the *degree* of discretion. The union is prepared to accept discretionary merit pay over and above a wage grid. The employer wishes to have greater discretion. It is submitted that the bargaining should have continued on this issue. It was the union's intractability on this issue that caused the breakdown of negotiations, since if the parties settled wages, all else would fall into line.

64. Counsel for the respondent lays the blame for the prolonged negotiations at the feet of the applicant. The interim certificate for this bargaining unit was issued by the Board on April 27, 1990. Not until July 26 did the union send a notice to bargain, and only in September were its proposals finalized for the purpose of submission to the respondent. Counsel argues that the proposals of the union are built around building high expectations so that it can be seen as making major moves without really making much progress overall. Further, the Guild insisted on bargaining on the first four provisions, while the Reporter wished to begin with any issue that would be simple to resolve. The Guild's approach, which included one of the major areas of disagreement, union security, led to endless dialogue for many months. Counsel characterizes the union's reliance on incidents at the bargaining table as an attempt to turn minor issues into major ones. Counsel also points to the union's change of position on the referral of grievances to arbitration as indicating lack of good faith.

65. In counsel's submission, the evidence given by Ms. Soboda demonstrated for the Board why bargaining accomplished so little until September of 1991. He characterizes her as argumentative, and self-serving in her evidence. Counsel identifies inconsistencies between her evidence and that of Mr. Petrie, and between different parts of her own testimony. In general, he describes her evidence as an attempt to create disputes where none had been present previously, in an effort to search for circumstances to support this application. Counsel accuses Ms. Soboda of holding a double standard. Where the Guild changed a position, or made clerical mistakes in the submission of proposals, she wants the company to accept these as *bona fide*. On the other hand, she imputes malice to every move made by the company.

66. In the submission of counsel, the union simply gave up too soon. He argues that the purpose of section 41(2) is not to supplant free collective bargaining in general, but only where the circumstances identified in that section are shown to exist. If there has been unjustified intransigence in these negotiations, it has been that of the Guild. Counsel contrasts this case with the facts of *Grant Forest Products Corporation, supra*. Here, he submits, there has been no final offer. There is room to negotiate, and the union knew it. Counsel also relies on *Sumner Press Ltd.*, [1991] OLRB Rep. Oct. 1207 as reflecting the fact that the Board has to be sensitive to the economic circumstances that drive bargaining proposals. He states that the conclusion of the Board in that case that the Guild's focus in bargaining was the building of a case for litigation is exactly replicated in the Guild's conduct in the present case.

67. With respect to the Guild's reliance on section 41(2)(d), counsel for the respondent states that the union's submissions under that provision are no different from its submissions under subsection (c). The respondent cannot be blamed for the timing of its wage proposal, since the parties had agreed that monetary issues would be bargained at the end of negotiations, when other matters had been settled.

68. In addition to those cases mentioned, counsel for the respondent also relies on: *Nepean*

Roof Truss Limited, [1986] OLRB Rep. July 1005; *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441; *Juvenile Detention (Niagara) Inc.*, [1987] OLRB Rep. Jan. 66; *Formula Plastics Inc.*, [1987] OLRB Rep. May 702; *Alma College*, [1987] OLRB Rep. Dec. 1453; *Grant Forest Products Corporation*, [1991] OLRB Rep. July 848; *The Citizen (A Division of Southam Press Limited)*, [1979] 2 Can. LRB 251; and *Sumner Press Ltd.*, [1991] OLRB Rep. Oct. 1207.

69. In reply argument, counsel for the union states that the respondent's reliance on economic circumstances is irrelevant for the purposes of this case. The negotiations did not break down over the amount of the increase sought by the Guild. The parties did not negotiate that issue because the employer did not make an offer which could be compared to that of the Guild. The issue, in his submission, was not about money but about how it was to be given. He agrees with counsel for the respondent that there is a "new Thomson" in place. Counsel states that this is precisely the reason why no further negotiations were possible. The employer took an intransigent position based on a new Thomson philosophy from which it could not deviate.

70. Further, counsel submits that the materials filed by the respondent supported the union's position. The academic articles demonstrate that pay for performance is a concept which is principally relevant to the non-union sector, rather than to collective bargaining relationships. The collective agreements submitted by the respondent provide for wage grids except for the one imposed by the Canada Labour Relations Board in *Union of Bank Employees (Ontario)*, *Local 2104*, *Canadian Labour Congress and Canadian Imperial Bank of Commerce* (1986) 65 di 1, which counsel urged is not a relevant precedent for this Board. Counsel also distinguished *Sumner Press Ltd.* on the basis that it was a case brought under section 15 of the Act and thus different in legal framework.

71. The Board reserved its decision at the conclusion of the hearing. Upon some reflection on the issues raised in this application, we invited the parties to make further submissions in writing on the interpretation and applicability of section 41(2)(d) of the Act in this matter, having regard to the discussion of this provision in *Juvenile Detention (Niagara) Inc.*, *supra* and *Placer Dome Inc.* [1991] OLRB Rep. March 357, and the applicant's submissions at the hearing. Submissions from the applicant were received on February 18. Among other things, the applicant states:

It is the position of the Union that the facts upon which the Board may rely as constituting "any other reason relevant" for the purposes of Section 41(d) could also support a finding under Sections 41(2)(a), (b) and (c). Thus, the Board may find that the Employer's wage proposal supports a finding that the Respondent has failed to make reasonable or expeditious efforts to conclude a collective agreement and also that the Employer's conduct falls within Section 41(2)(d) as a relevant reason for the Board to conclude "that the process of collective bargaining has been unsuccessful".

It is open, as well, for the Board to conclude the conduct of the Employer, while not constituting conduct falling within Section 41(2)(a), (b) and (c), nevertheless establishes reasons which are relevant in determining that the process of collective bargaining has been unsuccessful.

The Wage Proposal

It is the submission of the Union that both the timing of the tabling of the Employer's "wage proposal", and the unprecedented nature of that proposal in the collective bargaining context were such as to inevitably render the process of collective bargaining unsuccessful. The Employer's wage proposal left completely unresolved and subject to negotiation at some future date during the currency of the collective agreement essential components of the wage proposal, including the job description system, the job evaluation system, the wage ranges for each job, and the performance appraisal system. Negotiations in respect of these items were to take place only after the collective agreement was executed and, as a result, at a time when economic sanctions would be unlawful. Thus, none of these key components of the wage proposal were

intended to be resolved through normal collective bargaining. The Union submits that the Employer's proposal, including the method proposed for resolving outstanding issues, created an irredeemable breakdown in collective bargaining, or "logjam", which resulted in the process of collective bargaining being unsuccessful and which should be remedied by a direction under Section 41.

• • • •

In *Placer Dome Inc.*, [1991] O.L.R.B. Rep. Mar. 357, the Board directed the settlement of a first collective agreement by arbitration relying in part on Section 41(2)(d). In that case, the Board at paragraph 40 quoted this statement from Professor Weiler:

...Certification does give the trade union a license to bargain for the unit. It imposes a corresponding obligation on the employer to sit down at the table with the union and make a sincere effort to reach agreement about terms and conditions of employment. But the law does not, as it cannot, tell the employer that it must settle the contract on the union's terms, any more than the employer can oblige the union to agree to the employer's terms. A system of free collective bargaining means that the law, through its agencies such as the labour board, has no right to evaluate the proposals made by either side or to tell them what concessions they must make. If the parties are truly free to agree, they must also be legally entitled to disagree. *The assumption of our system is that when they do reach such an impasse, an economic test of strength must take place to break the logjam. It is the strike that determines which side will find it more painful to disagree, which party will be forced to make the major moves toward compromise.*

[emphasis added]

Professor Weiler's comments are made outside of the context of Section 41 of the Ontario *Labour Relations Act* and prior to its introduction. Section 41 of the Act contemplates that in certain circumstances an economic test of strength need not take place where collective bargaining has been unsuccessful. Section 41 of the Act allows the Board to break logjams between the parties for any reason the Board considers relevant. The use of Section 41 to break a logjam where the parties are unlikely to do so through the process of collective bargaining has been specifically recognized by the Board in *Placer Dome* itself. It is submitted that in the instant case it is also appropriate for the Board to exercise its discretion under Section 41(2)(d) and break the logjam given that the Employer's proposal by its terms does not resolve outstanding differences through the collective bargaining process but outside the process, and that, as a result, the collective bargaining process to date has been unsuccessful. Under the Employer's proposal, the Union is required to sign a collective agreement in the "blind faith" that the parties will agree to its critical components without access to the normal dispute resolution mechanisms. Not only is the Union being asked to agree to "breakthrough" language and an unprecedented system for determining wages and wage increases in a first collective agreement, it is also being asked to accept a "breakthrough" process totally outside the normal collective bargaining process for settling wages, the most critical concern of unions in collective bargaining. This is of particular concern where the Employer has through its prior conduct violated the Act, on its own admission, in determining compensation payable to employees.

In the *Placer Dome*, decision, the Board found that the collective bargaining process was placed in a "straitjacket" by the Employer's insistence in giving consideration to the Dona Lake Agreement, an "externality" to the collective bargaining process. As a result of the fact that the normal process of collective bargaining to resolve disputes could not effect an agreement, the Board found that the collective bargaining process was not likely to succeed, and required the Board's intervention under Section 41(2)(d). In the case at bar, the Employer itself has created a collective bargaining straitjacket by rejecting the normal collective bargaining processes and by asking the Union to agree to not settle any wage rates at the time of executing the collective agreement, but rather to discuss these issues during the first year of the agreement to determine the wage rates in the second and third year, and leave the awarding of increases solely to the discretion of the Employer. The Employer's own position rejects normal collective bargaining as a method for resolving a bargaining impasse and has made the settlement of issues in dispute impossible to reach through the procedures contemplated under the Act, including both bargain-

ing and economic sanctions. As a result, this Board must supply the dispute resolution mechanism, which is totally absent from the Employer's proposal through a direction under Section 41.

• • • •

72. In response, the respondent submits, among other things, as follows:

The Applicant has repeated in its written Submissions the same arguments it advanced at the Hearings in this matter; namely that the timing and content of the Employer wage proposal may support a finding under sub paragraph (d) as well as sub paragraph (c) of section 41(2) of the *Labour Relations Act*. While we agree with the Applicant that it is employer conduct that is to be assessed under sub-paragraph (d) of section 41(2), the facts do not support a finding in this case that the Employer's wage proposal is the reason that the "process of the collective bargaining has been unsuccessful".

• • • •

Argument

The Employer's submission is that no impasse in collective bargaining was ever reached. The Employer's position was not final nor "bottom line". It invited more Union involvement in the wage administration systems being proposed. The Union, even though it admits it had further bargaining flexibility, broke off negotiations without either exploring the Employer's offer or advancing new proposals of its own. The parties were not at an impasse and, as Mr. Weir testified, he was sure with more discussion the parties would get an agreement.

With respect to the *Niagara Detention* decision, we respectfully rely on the fact that no impasse was reached in the collective bargaining process and on this ground the application was not granted. This element of impasse is necessary under any sub-paragraph of Section 41(2). In any event, all of the facts relied on by the Applicant fall under sub-paragraphs (a) to (c) concerning which the Board already has full oral submissions of the parties with obviously no need for further repetition in writing.

As to the *Placer Dome* decision, there is no external influences such as a "Dona Lake Agreement" that constrained either party at the bargaining table in this case. There are no externalities that "put the collective bargaining process in a strait jacket and mire bargaining parties in a web of conflicting claims". The Employer's bargaining position on wages relied on by the Union as the reason for the bargaining process being unsuccessful falls under sub-paragraph (c) and not under sub-paragraph (d).

Decision of the Board

73. Sections 41(1) and (2) read as follows:

41-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;

- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

74. We have concluded that the facts of this case merit a direction by the Board of first contract arbitration under section 41(2) and accordingly directed on February 21, 1992. If for no other reason, we find that there are compelling circumstances that led to the failure of the process of collective bargaining which warrant a direction by the Board under section 41(2)(d).

75. Has the process of collective bargaining been unsuccessful between these parties? The parties have had some 31 negotiating meetings. In efforts to improve the process of bargaining, the parties have made changes to their own spokespersons, and have used conciliation services. Among the materials filed by the respondent are lists which show the articles still outstanding. These show that there are just about as many issues which remain outstanding after more than a year of very intense bargaining, as have been settled. Further, of 224 proposals by both parties, which include articles and sub-articles, 87 have been agreed, and 86 remain outstanding. Included amongst outstanding issues are provisions relating to union security, management rights, compensation for overtime, preceding and other agreements, and wages.

76. As the strike deadline approached, the parties were engaged in round-the-clock bargaining. Some progress was made during this time, but the entire process became irreparably unhinged upon the presentation of the respondent's wage offer, at 5:30 a.m. on November 7. We cannot determine whether success in reaching an agreement on wage issues would have led all other outstanding matters to fall into place, as was Mr. Butler's view. In any event, it is clear to us that when the parties separated on November 7, they were still in disagreement over many issues, and in particular, had an unmistakable difference on the wages issue. We accept the evidence of Mr. Petrie that he specifically asked Mr. Weir if the employer's bottom line position on wages included total employer discretion to determine wage increases during the life of the collective agreement, and that the response he received was that it did. Mr. Weir agreed that this is the company's proposal, and this characterization is consistent with the testimony of both Mr. Weir and Mr. Butler as to the company's justifications for its proposal. Although it is clear that the company has offered some flexibility on certain aspects of its proposal, such as the opportunity for the union to negotiate mid-points with the company during the life of the agreement, the key element of discretionary increases was non-negotiable, and this was unacceptable to the union.

77. We thus conclude that the process of collective bargaining has been unsuccessful between the parties. We are also satisfied that the reasons for the lack of success relate to section 41(2)(d) of the Act. Although this subsection has not often been applied, it was discussed in *Placer Dome Inc.*, where the Board directed arbitration pursuant to section 41(2)(a) and (d). In this case, Placer Dome Inc., a mining company, had entered into an agreement involving a local Indian band, a tribal council, the government of Canada and the government of Ontario with respect to the development of a mine located in the vicinity of certain Indian lands. Among the terms of this agreement (the Dona Lake Agreement) were employment guarantees and training opportunities for native workers. Subsequent to this, the United Steelworkers of America was certified as the bargaining agent for a unit of the company's employees. During the course of bargaining, it became clear that the company found itself in a potential conflict between its obligations under the Dona Lake Agreement, which contained provisions regarding the employment of native persons, and its obligations under the collective agreement it was negotiating with the union. Its response was to take the position during bargaining that the Dona Lake Agreement would have to be recognized by the union as taking precedence with respect to the terms and conditions for native workers over any provision in a subsequently negotiated collective agreement. In effect, the company

was refusing to bargain with the union over the terms and conditions of employment of native workers in the bargaining unit.

78. The Board found in *Placer Dome Inc.* that the employer's bargaining stance amounted to a refusal to recognize the union's bargaining authority within the meaning of section 41(2)(a) of the Act. Further, the Board stated:

47. In addition, it is our view that the array of third party, community, and government interests evident in this case so overshadows, burdens, and impedes the bilateral bargaining process envisaged by the *Labour Relations Act* that it constitutes the kind of circumstance which would warrant the exercise of our discretion under section 40a [now 41](2)(d). These externalities put the collective bargaining process in a strait-jacket and mire the bargaining parties in a web of conflicting claims from which they are unlikely to be able to extricate themselves through any of the normal collective bargaining processes, including the use of economic sanctions. In our view, this is not a case of the kind described by Professor Weiler above, where resort to raw bargaining power either should, or is likely to, result in successful collective bargaining and a sensible compromise. In these unique circumstances, the bargaining process has been frustrated, and it is appropriate for the Board to step in to "break the log jam".

79. We find the comments of the Board in *Placer Dome Inc.* apt in the context of the present case. The *Labour Relations Act* is a regime governing employment relations which embodies aspects of both statutory limitations and obligations and freedom of contract. The Act encourages the practice and procedure of collective bargaining and provides for mechanisms whereby a trade union acquires, in the words of Professor Weiler (see paragraph 71 above), a "license" to bargain on behalf of a unit of employees. Once a union acquires such a license, the law imposes an obligation on the parties to negotiate in good faith and make every reasonable effort to conclude a collective agreement. Historically, as described by Professor Weiler, the assumption of the system has been that when the parties reach an impasse, an economic test of strength is used to break the impasse. Section 41 introduces an exception or variation to that assumption. As stated by this Board elsewhere, section 41 introduces a "unique facilitative tool into the traditional bargaining process in Ontario" in which the legislature has specifically acknowledged the significance to the collective bargaining relationship of the first contract: see *Nepean Roof Truss*, *supra*, paras. 15-16. The provisions of section 41 give recognition to the fact that there are circumstances where the purposes of the statute are not advanced or realized through reliance on economic sanctions alone in a first contract situation.

80. Further, in applying section 41, the Board has stated that this provision represents a departure from the Board's previous jurisprudence under section 15. To the extent that a consideration of section 41(2)(b) requires the Board to examine the intrinsic reasonableness of a negotiating position, for example, it takes the Board into an area of scrutiny which goes beyond the traditional ambit of section 15: see *Formula Plastics Inc.*, *supra*, para. 27. Also, to the extent that the application of section 41 is not contingent on a finding of bad faith or anti-union animus, it represents a broadening of what was the focus of the Board's investigations under section 15. As stated in *Formula Plastics Inc.*:

39. We note particularly that the provisions of 40a [now 41] (2)(b) are not necessarily predicated on any egregious conduct on the part of an employer. There is no requirement of bad faith or anti-union animus (although these factors may be relevant) and a direction to settle a first contract by arbitration is not a penalty visited upon an employer. Rather, section 40a as a whole represents the identification of a series of situations in which the Legislature has determined that a malfunctioning labour relationship requires a special mechanism to repair or strengthen it. Indeed, it may well be that some of the provisions of section 40a will apply even where the respondent's conduct stems from ignorance, inexperience or ineptitude. Thus a finding that the conditions of section 40a(2)(b) have been met does not necessarily carry with it the same stigma

that might attach to a finding that a party has violated the Act, and is not inconsistent with the Board's dismissal of the section 15 complaint in the circumstances of this case.

81. In *Crane Canada Inc.*, *supra*, a board of arbitration directed to settle the first agreement between the parties had this to say about the provisions for direction of first agreements:

In an ideal world of collective bargaining there should be no need for the statutory arbitration of first collective agreements. Realities, however, have dictated otherwise. Notwithstanding the stated legislative policy to encourage collective bargaining between employers and trade unions, a policy which, it should be emphasized, has been generally successful in Ontario, the labour relations climate has from time-to-time been marred by a minority of disputes in which the parties, by inadvertence or design, have been unable to achieve a first collective agreement following the certification of a union. Some of these disputes have achieved great notoriety, attracting media attention to intense picket line disputes while others have all but completely escaped public notice. In either case the result is the same: the failure of the process of employee representation by a trade union to result in a collective agreement mutually acceptable to the parties. If the policy of the **Labour Relations Act** is to be realized, the certification of a union should be the first step in a process that culminates in the execution of a collective agreement that brings to employees a measure of certainty in the knowledge of their contractual rights and dignity in the knowledge that they can be enforced. While the **Labour Relations Act** does not require an employer to be overjoyed with the prospect of union representation for a group of its employees, the employer is nevertheless legally bound to recognize the union as their freely chosen sole bargaining agent and to bargain in good faith, making every reasonable effort to conclude a collective agreement.

While the **Labour Relations Act** does not mandate that the execution of a collective agreement be guaranteed in every case where a union is certified, the obligations and procedures which are established within the Act are plainly fashioned to facilitate and encourage that outcome. The Act contemplates that a prescribed process is to be followed in an effort to achieve the making of a first collective agreement and its subsequent renewal in the form of successive agreements thereafter. It is not the failure to make the collective agreement, but the breakdown of the collective bargaining process, which is the rationale for the first agreement arbitration provision in the Act....

Section 40a [now 41] of the **Labour Relations Act** addresses situations where the respondent has violated the Act. It is significant, however, that it does not limit its application to those circumstances. The section might be applied, for example, where earlier unfair labour practices occurred during a certification campaign, with adverse effects on the union's ability to bargain even after certification has been achieved. The fact that no violation of the Act takes place at the bargaining stage does not foreclose the Labour Board's ability to remedy the ongoing impact of earlier events. Or, alternatively, circumstances may obtain in which neither party has engaged in unlawful conduct nor exhibited bad faith, but where they have nevertheless been unable to come to grips with the issues that divide them. Essentially, section 40(a) is intended to apply in those circumstances where the normally contemplated processes of collective bargaining have broken down. Where that is established, on the basis of any of the reasons articulated within the section, the Labour Relations Board may direct the arbitration of a first collective agreement.

82. We find the circumstances of this case to represent the type of "malfunctioning labour relationship" and breakdown of the collective bargaining process identified by the boards above which warrants the direction of first contract arbitration. It is clear to us on the evidence that the parties are in a "logjam". Despite exhaustive negotiations and a prolonged strike, they have been unable to arrive at a collective agreement. This is not a case where free collective bargaining has been successful, but where it has failed to achieve an agreement. On the evidence in this case, we find that this is so because the parties have been unable to disentangle themselves from pressures, limitations and agendas which are not derived from the collective bargaining process itself. The bargaining between the parties has from the beginning of the process been informed and affected by these other factors.

83. The evidence of Mr. Weir was candid and informative. From his testimony, the Board learned about the “new” Thomson Newspapers, which is devoted to implementing a decentralist organizational strategy. Ironically, at the same time that this strategy appears to give Thomson Newspapers publishers independence to pursue the “bottom line”, it also provides them with specific direction as to changes to be implemented to employment policies in order to comply with this decentralist program. Mr. Weir described how the “pay for performance” concept derives from the decentralist goals of the company and how it is linked to other corporate initiatives in the areas of incentive pay and bonus programs. Mr. Weir and Mr. Butler both testified that labour relations is an area which Thomson Newspapers leaves to individual publishers to determine. However, it is also clear from their evidence that the relationship between pay for performance and the new corporate mandate of Thomson Newspapers is so explicit and direct that it is unlikely Mr. Butler would have refused to incorporate it into the Reporter’s proposals during bargaining. We find that, whether implicitly or explicitly, the implementation of pay for performance as part of an overall Thomson Newspapers strategy imposed limitations on the Reporter’s bargaining proposals. We are reinforced in our conclusion by the fact that Mr. Butler decided to adopt the Thomson Newspapers pay for performance system as part of the Reporter’s bargaining proposals at a time when Thomson Newspapers was only in the process of developing the system, and at a time months before he actually became familiar with its details. In other words, Mr. Butler became committed to the system, and worried about the details later.

84. As much as the Reporter found itself ideologically bound to its position on pay for performance, the Guild was also unable to agree to any wage proposal which did not contain, at a minimum, a wage grid with classifications and automatic increases. As both Mr. Petrie and Ms. Soboda testified, one of the primary reasons that they understood motivated employees to organize the unit was the desire to have some say over wages. Further, although the respondent maintains that the bargaining at the Mercury and the bargaining at the Reporter were totally independent, there is no doubt that one had an influence on the other. Certainly, in the Guild’s perception, the two sets of negotiations brought them to the table with the same opponent, Thomson Newspapers. Rightly or wrongly, the Guild assumed that the entire bargaining agenda of the Reporter was controlled by Thomson Newspapers.

85. Whether or not the Guild’s assumption was correct, it affected from the beginning the way in which the Guild viewed the negotiations. From their experience in bargaining with newspapers owned by Thomson Newspapers, the Guild’s negotiators have adopted a view of Thomson Newspapers as a hard bargainer with a dislike of unions. In this case, the parties went from interim certification, to unfair labour practice complaints, to negotiations. From the beginning, therefore, the Guild took aggressive bargaining positions. Its negotiators were convinced that they were facing not just one newspaper, but the whole Thomson corporation. Particularly on the issue of wages, they could not be seen as giving in to the Reporter because it would be the thin edge of the wedge for all of the other Thomson Newspapers with which the Guild had agreements. In retrospect, the Guild was at least partially right about Thomson Newspapers being in the background, when it came to the crucial issue of wages. Well before this, however, the effect of these assumptions was to give the negotiations a certain cast and tone from which the parties were unable to extricate themselves.

86. We have sketched out above some of the factors which we see as having contributed to these parties’ inability, over prolonged negotiations, to come to grips with the issues which divide them. The evidence we have set out earlier in this decision also illustrates the great divide between the parties on a whole range of issues and events. The result of all of this is what we see as a logjam. The differences between the parties have become magnified by an obvious breakdown of trust over the course of the 31 bargaining meetings. Further the parties arrive at some of the issues

with strongly held principles. The dispute over wages, for instance, may at first glance seem minor, when one considers that the Guild has negotiated and was prepared to agree to a form of discretionary merit pay over and above a wage grid. However, it is clear that to the parties themselves, they represent differing philosophies of compensation. The company states that it objects to a wage grid, even with a merit pay component, because it fails to motivate employees, and leaves the employer with the unsatisfactory route of using discipline as a form of negative motivation. The union states that it cannot agree to discretionary wage increases based on performance appraisals because this leaves employees at the mercy of their supervisors and ultimately, the publisher. Although the issue was not crystallized until the final day of bargaining, it was canvassed in three separate meetings on November 7. At the conclusion of those, it is apparent that the wage issue is one on which the parties have staked out definite, intractable and opposite positions, for all of the various reasons outlined above. It is also significant that other areas which remain in dispute are management rights and union security, important provisions which define the parties' relationship and roles.

87. In this context, we consider that the parties have become enmeshed in a dispute in which a variety of factors have skewed positions taken and distorted the bargaining process. It is a case where resort to the statutorily mandated mechanisms for assisting parties in negotiations, such as conciliation and mediation, have failed to achieve a result. An economic test of strength through resort to a strike has clearly also failed to break the logjam. As in *Placer Dome Inc.*, we do not see this case as one where continued reliance on raw bargaining power is likely to result in successful collective bargaining and a sensible compromise. The collective bargaining process has broken down, and the mechanisms which are available to the parties to help repair the process or resolve the dispute have not worked. We find it useful to refer to the functions of a first collective agreement. In *Crane Canada Inc.*, *supra*, the board of arbitration convened to settle the first collective agreement pursuant to a Board direction described the first agreement in the following way:

...The object of the exercise is not to penalize or reward the conduct of either party. Rather, it is to establish a collective agreement on such terms as will give employees and employer alike the experience of a period of not less than two years during which they may assess for themselves the value of having terms and conditions of employment negotiated and enforced through the representative services of a trade union. An important dimension is the opportunity for the employer to experience first-hand what it is like to conduct its employment relations on a day-to-day basis under a collective agreement that involves the participation - and often the assistance - of a trade union. The object of first agreement arbitration is to fashion a collective agreement whose terms will, insofar as possible, foster a relationship of enhanced trust between trade union and employer while providing the union a fair opportunity to demonstrate both to the employees it represents and to management the viability of collective bargaining as the basis for positive employment relations in the future.

88. In the circumstances of this case, where the normal collective bargaining processes have failed so thoroughly, we find it appropriate, without the necessity of attributing or assigning "fault" to any party to step in to direct arbitration of a first collective agreement which will give the parties some time to build a collective bargaining relationship. If faced with the choice of either stepping in, or allowing the parties to continue with a stand-off from which, in our view, they are unlikely to disentangle themselves, we choose in this case to step in. We emphasize that we are not suggesting that every situation where the parties have bargained to impasse will result in a direction under section 41(2)(d). There is a tangle of circumstances in this case, developing over the course of lengthy negotiations and a strike, which has resulted in a logjam which we see as warranting the Board's intervention. Because of our findings under section 41(2)(d), it is unnecessary for us to express our views with respect to the applicability of sections 41(2)(a), (b) and (c).

3167-91-R Rosetta Luciani, Applicant v. The Hotel Employees: Restaurant Employees Union, Local 75 of the Hotel Employees, Restaurant Employees International Union, Respondent v. **Cara Operations Limited**, Intervener

Termination - Applicant making second termination application in two months - Board dismissing earlier application because less than forty-five per cent of employees had signed statement of desire in support of it - Union asking Board to dismiss second application with a bar - Board satisfied that representation issue not truly determined in first application - Union's motion dismissed by Board

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Kobryn*.

APPEARANCES: *David Turner, Sharon Freedman* and *Rosetta Luciani* for the applicant; *Kevin Whitaker, Jerry Jones* and *Rick Frechette* for the respondent; *Brian O'Byrne, Ken Davis* and *Paul T. Bachand* for the intervener.

DECISION OF THE BOARD; March 13, 1992

1. This is an application under (what is now) section 58 of the *Labour Relations Act* for a declaration that the respondent trade union no longer represents certain employees of the intervener Cara Operations Limited. The parties are agreed that the bargaining unit to which this application relates is described as:

all employees of Cara Operations Limited in its Airline Services Division at its Flight Kitchens at the Toronto International Airport, save and except supervisors, persons above the rank of supervisor and office staff.

2. At a hearing on January 31, 1992, the respondent sought to have the Board dismiss the application and impose a bar to further such applications in the exercise of its discretion under (what is now) section 105(2)(i) of the *Labour Relations Act*. Upon hearing the representations of the parties in that respect, the Board ruled, orally, that it was not satisfied that it should exercise its discretion in the manner requested and dismissed the respondent's motion. The Board's reasons follow.

3. The applicant herein had also made a previous application for a declaration terminating the same bargaining rights as those in issue herein. The first application, in Board File No. 2601-91-R, was made on November 12, 1991. It was processed in accordance with the Board's usual procedures which included fixing a terminal date of November 25, 1991, and scheduling a meeting with a Labour Relations Officer for December 6, 1991 and a hearing for December 13, 1991. The Officer's meeting was adjourned to December 13, 1991 and proceeded on that date and on December 17, 1991. The hearing was rescheduled for December 20, 1991.

4. After the parties worked through the application with the Labour Relations Officer, they were advised, on December 17, 1991, that it appeared that less than forty-five per cent of the employees in the bargaining unit for purposes of the application had signed the statement of desire filed in support of it and that the applicant therefore appeared to be in a dismissible position. The applicant indicated, at that time, that she nevertheless wished to proceed to a hearing with respect to certain unfair labour practice allegations she had made. The following day, however, by letter from counsel dated December 18, 1991, the applicant wrote:

This is to inform the Board that the applicant hereby withdraws the current application ... without prejudice.

5. By letter dated December 19, 1991, the respondent advised the Board that it did not consent to the withdrawal of the application on a without prejudice basis and requested an opportunity to argue before the Board that the application should be dismissed and a bar imposed.

6. The Board (differently constituted) heard the representations of the parties in that respect at the December 20, 1991 hearing and ruled, orally, that the application should be dismissed, but no bar was imposed to any subsequent applications. We were advised that in making that ruling, the Board indicated that the issue of a bar could be raised in a subsequent application if one was made.

7. This application was made on January 3, 1992.

8. The respondent argued that the representation issued raised by this application had been tested and determined in the first application and that the respondent has not had a reasonable opportunity to pursue collective bargaining since then. The respondent urged the Board to balance what is characterized as being the competing interests and policy considerations behind sections 58 and 105(2)(i) (that is, the representation interest versus the protection of existing collective bargaining relationships) by dismissing this application with a bar. The respondent argued in that in balancing the two interests the Board should ask itself the following questions:

- (1) has the applicant had a fair chance to raise the representation issue?
- (2) if so, has the union had a reasonable opportunity to bargain since that issue was disposed of?
- (3) are there any exceptional circumstances?

In support of its position, the respondent relied upon the Board's decisions in *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 791; *Dunville Supermarket Limited*, [1980] OLRB Aug. 193; *Browning-Ferris Industries*, [1982] OLRB Rep. June 816 and [1982] OLRB Rep. Sept. 1253; *Storwall International Inc.*, [1985] OLRB Rep. Nov. 1679 and *R.L.D. Electric*, [1986] OLRB Rep. Aug. 1145, and it submitted that, in this case, the Board should conclude that the questions it had submitted should be answered "Yes", "No", and "No", and that the application should therefore be dismissed with a bar.

9. The applicant agreed that it was appropriate to seek a balance between the right to test representation rights and the right to maintain and pursue a collective bargaining relationship. However, counsel submitted that the true wishes of the employees had not been tested with respect to the representation issue in this case and that the disruption to the collective bargaining relationship complained about by the respondent is inherent in any termination application and is therefore specifically contemplated by the Act. Counsel sought to distinguish the cases relied upon the respondent and also referred to the Board decisions in *Soo Dairies Limited*, [1971] OLRB Rep. July 439 and *Repac Construction & Materials Limited*, [1978] OLRB Rep. Jan. 91. The applicant argued that balancing of interests in this case favoured allowing this application to proceed in order to permit the representation issue to be truly tested.

10. The intervenor employer quite properly took no position with respect to the respondent's motion as such. It limited its submissions to the denying the respondent's allegations, in argument, that the intervenor had refused to bargain and to responding to the applicant's complaints with respect to the quality of the list of employees filed in the first application.

11. The situation before the Board in this case was analogous to one in which a trade union

applies to be certified for a bargaining unit of employees already represented by another trade union, discovers that it has miscalculated its membership position, subsequently seeks to withdraw its application, but has its application dismissed because of the stage of the proceedings. In those circumstances, a subsequent application by the same union would not generally be dismissed by the Board in the exercise of its discretion under section 105(2)(i) of the Act, mainly because the Board does not consider that the representation issue in such circumstances has been both raised and determined. Accordingly, the first question is not quite as characterized by the respondent. As the Board's jurisprudence demonstrates, that question is not just whether there has been a fair opportunity to raise the representation issue, but whether the representation issue has been raised and determined.

12. As the Board said in the often quoted paragraph 16 of *Seven-Up (Ontario) Limited*, *supra*:

16. The *Trinidad Leaseholds Case* and subsequent decisions based on its principles stand for the proposition that when a second application for certification or termination is made upon the heels of a prior application involving the same parties, in determining whether it should refuse to entertain the second application, the Board must balance the right to test an incumbent trade union's strength among the employees it represents at an appropriate time against the maintaining of continuity and stability in an existing collective bargaining relationship. Stated another way, *once a representation issue has been dealt with on its merits* and in the absence of special circumstances, then an incumbent trade union ought to be afforded a reasonable opportunity to demonstrate, without undue impediment, its ability to bargain with that employer for a collective agreement on behalf of those employees it represents.

[emphasis added]

13. Certainly, the mere fact that there has been one representation application which has been dismissed does not mean that a second one, made soon after, should necessarily not be entertained by the Board. In order for the Board to properly exercise its discretion to entertain a representation application which is otherwise properly made, it must, in our view, be satisfied that the representation issue was truly determined in the first proceeding and that, in all the circumstances, it is appropriate to refuse the second one to proceed in the interest of labour relations stability. *Seven-Up (Ontario) Limited*, *supra*, *Dunville Supermarket Limited*, *supra*, *Browning-Ferris Industries*, *supra*, *Storwall International Inc.*, *supra*, and *R.L.D. Electric*, *supra*, are all examples of cases in which the Board was so satisfied. *Soo Dairies Limited*, *supra* and *Repac Construction & Materials Limited*, *supra* are examples of circumstances in which the Board was not so satisfied. The jurisprudence also demonstrates the idiosyncratic nature of such cases.

14. Obviously, discretionary determinations such as this, must be made judiciously on the basis of the circumstances peculiar to each case. It is neither possible nor appropriate to establish a catalogue or set of rules in that respect. In this instance, the Board was satisfied that, in the circumstances of described, the situation was analogous to that described in paragraph 11 above. The Board was satisfied that, what appears to be a very real

representation issue was not truly determined in the first application, and that in the interests of both short and long term labour relations considerations, it should be. We find it neither necessary nor appropriate to comment further.

15. The respondent's motion under section 105(2)(i) of the Act is therefore dismissed *afore-said*.

16. This matter will proceed as scheduled by the Registrar.

2718-91-R United Steelworkers of America, Applicant v. Centre de Re-éducation Cor Jesu De Timmins Inc./Cor Jesu Re-education Centre of Timmins Inc., Respondent

Certification - Union requesting that it be provided with copy of employee list in advance of Officer meeting - Employer agreeing to union's request so long as it permitted to see union's Form 9 at the same time - Board reviewing history of employee list issue and describing development of Board's regional certification program and expanded "waiver" program - Board explaining how waiver Officer now typically provides union with copy of the list after parties' positions on bargaining unit description identified - Board concluding that expanded form of "waiver" process affording Board means of striking more complete balance with respect to parties' competing concerns, while serving broader interests of economy and efficiency for community at large

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

DECISION OF THE CHAIR, M. G. MITCHNICK; March 16, 1992

1. This matter arises out of an application for certification, in which the Board had scheduled its usual meeting with a Labour Relations Officer for the purpose of narrowing and hopefully resolving any areas of dispute between the parties.

2. The applicant in correspondence to the Board requested that it be provided in advance of the Officer meeting with the Schedules to the employer's Reply in this matter (generally referred to as the "Employee Lists"). The applicant based its request on two grounds:

- 1) the affording to it of an adequate opportunity to investigate the employer's position in advance, so that it would be able to respond at the meeting with its own position, without further loss of time;
- 2) avoiding, through this advance preparation, what might be unnecessary exposure to the employer of who its inside advisor or supporter is; in other words, in the language of section 113 (formerly section 111) of the Act, avoiding disclosing that such employee is a member of or desires to be represented by the trade union.

The response of the employer to the applicant's request was that it was quite prepared to have the applicant see the Employee Lists in advance of the meeting - so long as the employer was permitted at the same time to see the applicant's Form 9. (The latter is a reference to the "Declaration Concerning Membership Documents" that is required to be filed by an applicant for certification in support of its membership evidence, and the employer made it clear that its only interest in the document was in seeing the number of "cards" that had been filed.) The applicant declined that offer, and the issue has come before the Board for determination. In saying that, it should be noted that the applicant is one of three trade unions in the province who has been requesting that the Board provide it a copy of the "Employee List" upon receipt in each case, and the reference to the need for an opportunity to prepare in advance of any Board Officer's meeting is a common theme in the applicant's requests, irrespective of the size of the unit. And further, the applicant in its oral argument in this matter candidly advised that the second argument, that pertaining to employee exposure and confidentiality, is one that it will be making in every application for certification before the Board hereafter. It is clear, therefore, that the Board's practice with respect to the handling of "Employee Lists" from this point forward is not one that the Board is going to be in a position to develop "interstitially", but rather must be addressed in this decision.

3. Nor, it should be noted, can the Board at this point purport to address the issue of “Employee Lists” as one of first impression. Rather, there has been a long history to the manner in which the Board has dealt with this issue in the past, and some of the concerns the Board has articulated in the handling of certification issues as a whole have only recently been reaffirmed, albeit in other contexts. See, for example, *Fort Erie Duty-Free Shoppe Inc.*, [1991] OLRB Rep. Nov. 1268; *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618.

4. As for the “Employee List” issue itself, those familiar with the Board know that this is a subject that has attracted a substantial amount of rhetoric and emotion over the years - to a surprising degree, perhaps, when one considers exactly what it is the practices and debate have revolved around: a listing of employees in the proposed bargaining unit that is required under the Rules to be filed by a respondent to an application as a Schedule to its formal Reply. In the mid-1980’s there arose a series of cases in which the Board had occasion to begin a critical review of some of the practices that had been adopted by it as a way of responding to the concerns expressed by employers with regard to these Lists. Up to that point, for example, applicant trade unions had been permitted to “view” the List of Employees filed by the employer only in the presence of either the Board or a Labour Relations Officer, and *never* to make a copy of it. In the first case in which the issue arose for fresh scrutiny, *Airline Limousine*, [1985] OLRB Rep. Jan. 1, the Board, after ascertaining at the first day of hearing the parameters of the dispute between the parties, referred to an Officer the complex task of ascertaining through examination or discussion with the parties the actual list of employees who would fall within the various bargaining units being proposed. The respondent employer, it appears, at that stage disputed the entitlement of the applicant to see the Schedule of Employees that it had filed with its Reply *at all*. The Board wrote:

3. When these applications first came on for a hearing before the Board, it was apparent that it would be necessary to appoint a Board Officer to inquire into the employee lists and the composition of the proposed bargaining unit. During the course of that inquiry, a question arose as to whether the union should be given an opportunity to review and be provided with copies of the lists of employees whom the various respondents assert are appropriately included in the bargaining unit. The respondents argue that the union should not be given access to these lists. The union argues that it is entitled to them, and that they are necessary in order to fairly deal with the issues raised in these cases....

The Board then went on to rule:

13. It is not difficult to understand why the employee list is revealed. It would be a little curious if a trade union were to be granted a certificate because it had established the requisite level of support in the bargaining unit described generally, but left the hearing without a precise understanding of the basis on which its application succeeded. On a more basic level, when even a simple certification case involves a comparison of the union’s membership evidence with a list of employees in the bargaining unit, and there are statutorily prescribed consequences flowing from that calculation (a vote, outright certification, or dismissal), the union must be entitled to the employee list if it is to participate in the hearing in a meaningful way. How else can it properly protect and advance the rights of its members? How else can it determine whether through error, inadvertence, or improper intent the list of employees said to be in the bargaining unit is inaccurate? Now, of course, there may not be very many cases where an employer intentionally misrepresents the number of employees in the bargaining unit. But, as we have already noted, the speed with which the employer must respond to the certification application, the potential complexity of the issues, and the inevitable exercise of judgment will often result in the production of a list which, at least arguably, is not sufficient for the purpose of making the determinations required under sections 6 and 7 of the Act.

14. In our view, there is no sound basis for denying a trade union the opportunity to review the employee list and, in practice, the union has always been given that opportunity. If a question arises concerning the list, the union has never been denied an opportunity to review it. Nor is there any good reason why it should not make a copy or take notes, so that it can pursue its

inquiries, on its own time. We do not think that it makes sense to draw a distinction between *reviewing the list* and *taking a copy*, simply because the latter might assist a union in preparing its case or gathering information which could well result in a withdrawal of a challenge. It would be odd to structure a system in such a way as to reward union officials with a good memory, and multiply the difficulties in large bargaining units where there is the greatest potential for error or misjudgment; and we can only speculate about how a court would respond to this “hide and seek” approach to litigation, in which critical assertions of fact may be *revealed* or *reviewed*, but *not* copied, lest the party asserting those facts lose some tactical advantage attributable to the other’s ignorance. Adversarial attitudes are prevalent enough in our collective bargaining system, without elevating them to the status of principles governing the process by which employees acquire the right to bargain collectively through a union of their choice. If, in the course of a certification application, a union is entitled to review the list - as we find that it is - it is our view that the union should be entitled to make a copy, and, again as a practical matter, a union has always been accorded the right to make a list of all unfamiliar names for the purpose of challenge and investigation.

4. Similar sentiments were registered by the Board thereafter in *Metropolitan Separate School Board*, [1986] OLRB Rep. Dec. 1733, and *Kitchener-Waterloo Hospital*, [1988] OLRB Rep. April 406. The *Kitchener-Waterloo Hospital* case was a pre-hearing vote application involving a unit of 450 employees, and what the case actually decided, with respect to the conduct of pre-hearing vote meetings in general, was that

once the union makes the request, we are of the view that the Officer may properly give the union a copy to keep, consistent with ensuring that the union’s right to information relevant to issues involving the union which must be decided is an effective, as well as theoretical, right. (paragraph 11)

The proceedings in that case having already proceeded through the Officer meeting, the Board also ruled that it was appropriate for the applicant to be provided with a copy of the finalized Voter’s List as part of the Board’s decision directing the vote.

5. The *Metropolitan Separate School Board* case involved a large unit of non-“contract” teachers, and the Board after hearings on the matter determined that the position of *neither* party on the question of the appropriate bargaining unit was to be accepted, but rather that the appropriate unit was to be an “all-instructor” one that the Board had fashioned on its own. That obviously raised problems with the utility of the Employee List which had been filed and already reviewed by the parties at an earlier stage, and the Board accordingly dealt with that matter as follows:

1. ... In a decision dated September 9, [1986] OLRB Rep. Sept. 1259], we determined that the appropriate bargaining unit in this case is not as originally described in either the union’s Application or the employer’s Reply, but would include all instructors (that is, persons who teach but are not teachers as defined by the *Education Act*) regularly employed for more than ten hours per week.

2. Our finding with respect to the composition of the appropriate bargaining unit - that is, the description of the sorts of employees who are to be included in the unit - was not sufficient to dispose of this application. We still have to determine the identities of all persons who were actually employed in that unit as of the application date in order to then assess, from membership evidence filed, whether the percentage of those employees who were members of the applicant at the relevant time is sufficient, having regard to section 7 of the *Labour Relations Act*, to warrant either a representation vote or outright certification. The lists which had been prepared and filed by the employer and were examined by the union before our hearings began had dealt only with Heritage Language Instructors. As a starting point for identification of the persons employed in the unit we had since found appropriate, we needed new lists from the employer, naming the persons it claims were employed in that unit on the application date. Accordingly, in our decision of September 9th we ordered that the respondent prepare and file such lists prior to the continued hearing date, which was to be set by the Registrar.

3. As the bargaining unit we had found appropriate included persons in a range of job categories whom the union had not sought to organize, we thought it unlikely that the applicant could responsibly determine and state its position with respect to the accuracy of the employer's new lists on the continued hearing date without having some time prior to that date to study the new lists and make any necessary enquiries. Accordingly, in our decision of September 9th we ordered that the respondent deliver copies of these new lists to both the Board *and the union* within three weeks of that date or at least one week prior to the next hearing date, whichever was the earlier.

[emphasis in the original]

That directive prompted the following demurrer from the respondent, as set out in the decision of the Board:

I also note in paragraph 33 that the Board has directed M.S.S.B. to provide the lists of employees to the applicant trade union. This seems to run counter to the Board's normal practice with respect to employee lists and was not a matter that was raised before the Board during the hearing. Before our client is required to comply with that part of the Board's direction, I would appreciate an opportunity to address the Board on this point.

The respondent subsequently made it clear that its only objection was as to "when" the applicant got to review the list, not "whether", as follows:

My client has, of course, no objection to the applicant examining the employee lists at an appropriate point so that the applicant can determine whether it wishes to make any challenges to the list.

On the point of "whether", therefore, the Board simply noted that the respondent "sensibly conceded the Union's right to see the new lists it had filed", and referred to the above-quoted passages in *Airline Limousine* as dispositive of the issue, as the Board again stated, on the grounds of "natural justice" alone. On the remaining issue of "when", the Board then responded to the objection raised by the respondent as follows:

14. There are always limitations on the extent to which issues in a certification application can be defined in advance of hearing. In the case of disputes over the identity of persons employed in the appropriate unit at the relevant time the possibility of defining or even ascertaining the positions of the parties on the hearing date is greatly limited by the fact that the union ordinarily has no notice of the employer's position before the hearing date. There is only so much an applicant union can do to define and narrow the issues in a matter of minutes after learning what they are. Even if the union comes fully prepared for any eventuality - able to particularize its challenges and even address them with evidence available to be called that day - proceedings may still be delayed by the employer's inability to respond to challenges asserted at hearing. That problem occurred in *Martin Muhr Investments Inc.*, (Board File No. 0236-86-R, unreported decision dated May 16, 1986), for example, where a union's detailed challenges to a list it first saw that day could not be dealt with because counsel for the employer was not prepared to do so and was unable to contact anyone who could instruct him on the employer's answer to the union's allegations. There the Board noted:

In his own defense, counsel [for the respondent] observed that he had not known before the date of the hearing that there was any challenge to the list. While we do not accede to the applicant's request that we make a critical note about the respondent's inability to get instructions with respect to the applicant's challenges, we do note (as we did in the course of the hearing) that this difficulty would have been avoided had the respondent's lists been provided to the applicant in advance of the hearing, so that it could, in turn, review those lists and give the respondent advance notice of the challenges it proposed to make.

This was by no means the first time that the Board has commented on the adverse effect on the Board's processes of the current delays in informing an applicant union of the employer's posi-

tion on the list; for another example, see *Oaklands Regional Centre*, [1984] OLRB Rep. June 811 at 10.

• • •

16. Because applicant unions (and interested employees) do not ordinarily see the respondent employer's lists before the first hearing date, scheduled hearing time and the time of other parties and potential witnesses is regularly and systematically wasted on the first scheduled hearing date, while the union and anyone else with an interest in the issue do what they could have done more effectively before the hearing: review the list and make whatever inquiries are necessary to take a considered position on the accuracy of the list. Often there is not time to make the necessary inquiries, so the union simply challenges every name about which it is uncertain; the hearing is then adjourned and a fresh hearing date is set or an officer is appointed to make inquiries, in either event introducing delays and adding cost which might both have been reduced or eliminated had the union been given both the opportunity and the obligation to review the lists in advance of the scheduled hearing date. When a panel has become seized, the inability to make effective use of scheduled hearing time is even more critical, because of the increased difficulty of rescheduling a hearing before any particular panel at an early date.

17. Both before and since the creation of this Board, the general trend in the courts and other adjudicative tribunals has been toward adopting practices and procedures which encourage or force early and complete pre-hearing disclosure of each party's case to the opposite parties, so as to promote the settlement or narrowing of the issues to be tried, to enhance the quality of preparation and, hence, presentation of the evidence and argument on issues which remain to be tried and to achieve, by these and other means, a more efficient and effective use of the public resources devoted to dispute resolution. It should come as no surprise to anyone that the same trends should occur in the evolution of this Board's practices and policies. Those practices and policies are subject to critical examination from time to time, as they must be, in light of experience, the level of the Board's resources and the competing demands made on those resources. Any change in or departure from existing practice which would facilitate and encourage a narrowing of issues and better preparation for hearing by the parties without any significant increase in demand on Board resources is a change or departure which will attract the Board's serious consideration. Any contention that such a change should not be made for fear that the new procedure may be abused must be closely scrutinized, along with the implicit notion that the current procedure effectively prevents otherwise likely abuses and does not itself harbour the potential for abuse.

6. All of the above three decisions arose in the context of particularly large or complex certification applications, and, notwithstanding the comments of the Board, and what was done in those three cases themselves, the practice of the Board in general with respect to the Employee List did not change at all. In 1990, however, the Board did implement certain changes to its practices with respect to certification applications, driven by the type of broader concerns that had already been articulated, for example, in some of these previous cases. Thus, following some earlier experimentation on a limited basis, the Board at that time moved to what it saw as a generally more effective way to protect valuable hearing time, and indeed minimize litigation itself, by extending the use of Officer meetings in *advance* of the scheduled hearing date to cover all applications for certification (the normal practice, prior to this time, having been to arrange for a meeting with an Officer to take place on the same day as that scheduled for the hearing of the application itself). This provided the applicant in all cases with an opportunity to review and seek advice on the Employee List at least in advance of the hearing day. At the same time the Board eliminated the decidedly awkward practice of permitting such review to take place only in the presence of the Officer, and without the right to make or retain a copy of those Schedules for the applicant's own use in the file. Instead, all parties to the certification application currently are provided their own copy of the Schedules, when the point is reached where the List has become the subject matter of the discussions, and are expected to note the challenges or agreed-upon additions or deletions to the List as the Officer works through it. At the end of the Officer process all parties then receive a copy of the List as revised or challenged, forming part of the Officer's Report, and the parties

accordingly are taken to have accepted responsibility for the composition of the bargaining unit as reflected in that List. As for the traditional argument by employers that allowing an applicant trade union to transcribe or otherwise have a copy of the Employee List opens the Board's process up to "abuse", by way of a "fishing expedition" for purposes of a subsequent application, the Board can only repeat here what has been said a number of times before, and that is that as long as the applicant gets to see a copy of the List at *some* point (as it must), and to note anything on it with which it "disagrees", the potential for "abuse" has always existed, and falls to be controlled in exactly the same way by the Board at present as effectively existed in the past.

7. That brings us to the final issue surrounding the question of Employee Lists, being that of "gerrymandering" on the description of the appropriate bargaining unit, and it is precisely that element that the novel suggestion put forward by the respondent in the present case serves to highlight. The standard way in which the Board addresses an application for certification, whether it be, as was common in the past, by a panel at a hearing, or as had become more common recently, by an Officer at a meeting, is to begin with a discussion of the bargaining-unit "description". Once the parties' positions have been identified in that regard, the inquiry moves on to a review and discussion of the Employee List. At that point a party is not permitted to "resile" from positions previously arrived at with respect to the description of the bargaining unit, except to the extent that such alterations may properly be attributed to a dispute becoming identified only as a result of disclosure for the first time of the Employee List. Once again see, for example, *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618, as recently explained and confirmed by the Board in *Fort Erie Duty-Free Shoppe Inc.* [1991] OLRB Rep. Nov. 1268. Once the bargaining-unit description and Employee List have both been dealt with, the process goes on to deal with the membership evidence filed by the applicant in support of its application, in most cases culminating in an identification of the "count" (i.e. percentage level of support), or "appearance" of the count (the potential results of the application, depending on how the issues remaining in dispute fall to be resolved). And at *that* stage the employer is also granted access to the content of the applicant's Form 9 Declaration, including the description of any "irregularities" disclosed therein.

8. As matters stand now, therefore, an applicant for certification going into the process knows how many cards it has, and who signed them, but it may not know for certain how many of those cards are "good" - i.e. how many correspond to the names of employees who ultimately will be found to have been employed in the bargaining unit as of the date of the application - until it is able to see and have a determination made on the employer's Schedules. The employer, on the other hand, has the records to furnish it with the best knowledge of who it is that belongs on those Schedules, and thus in the bargaining unit, but it has no knowledge with respect to the level of membership evidence upon which the applicant is relying. That is the basis upon which the parties under both current and historical Board practice have been called upon to address the initial issue of the bargaining-unit description. The respondent in this case, of course, understands the Board's practice very well, and is simply saying: if the Board is going to arm the applicant with more information with which to apply "tactical" considerations to its position on the bargaining-unit description, we would like you to provide the respondent with additional information "up front" as well, so that it can approach the issue of the bargaining-unit description in the same way.

9. In favour of the respondent's suggestion is the fact, as noted, that all of this is information that each of the parties are respectively entitled to see in the application at *some* point. The Board is not persuaded, however, that the respondent's proposed approach is the best way to advance the certification procedures that the Board has been developing in recent years, and which appear to be serving the community's interests well. Certainly the points raised by the applicant ought to be items of concern for this Board, and the desire of the applicant to be able to address matters arising out of the "List" prior to any Officer meeting or scheduled hearing date is a legiti-

mate one. The issue of timely disclosure, permitting preparation in advance to avoid the loss of valuable hearing time, had been identified by the Board in the earlier decisions cited above, and has since been addressed, as discussed, through the interposing of the advance Officer meetings. But even the Officer meetings represent an investment of time and expense, both for the parties, and for the Board. Obviously the smaller the unit, the less concern there ought to be over "advance" disclosure and preparation time. But on the other hand, it is in exactly those smaller units that the exposure of supporters is of greatest concern to a Union. It is appropriate for this Board to ask itself, therefore, why an applicant for certification should be put to this requirement at all, when full disclosure and discussion of the parties' positions through proper use of the "Waiver" process might eliminate the time and expense of the parties ever having to come together in a direct setting entirely.

10. All of that leads us to the conclusion that the better approach at the present time is for the Board to continue on the path of extending its use of the "Waiver" program, as has already been underway, to assist the parties in addressing certification applications expeditiously and economically, while at the same time continuing insofar as practicable to deal with the issues that arise in such applications in the order in which they currently are being discussed. The way the process operates now is for the "Waiver Officer" to work through the bargaining-unit description issue, identifying the positions of the parties (whether or not full agreement can be reached), and then to move on to the consideration of the List of Employees. At that point, as in a Board hearing or Officer meeting, the applicant Union is provided with a working copy of the List. That is, prior to any meeting or hearing taking place, and indeed as part of a program whose aim it is to identify for the parties whether one or both of those alternate forms of proceeding may be unnecessary, the Waiver Officer places before the parties for agreement or at least debate, a copy of the Schedules that represent the employer's position on "the List". And that, with the advances of modern technology, is accomplished within moments of the point being reached at which consideration of the List becomes relevant.

11. As noted, the Board has, in more recent months, been eliminating the "restrictions" on the category of cases that can take advantage of this telephonic form of communication being offered by the Board, to the point where the still-used term of "Waiver" for the Program, and certainly "Practice Note" No. 12 issued by the Board in 1980 when the Program first was introduced, no longer accurately describe what the Board has in place. Rather, the facilitative process currently in effect allows parties to "waive" the Officer meeting and go directly to the scheduled hearing, if a hearing before the Board is the only practical way of addressing the issues that remain to be contested: for example, the voluntariness of a relevant petition; or the parties might even "waive" directly to an Officer (examination) appointment, if it is agreed that *that* is the most practical method at that stage for proceeding toward a resolution of the items that remain in dispute. Properly utilized, therefore, it would seem to the Board that this expanded form of "Waiver" process is capable of addressing the concerns that we believe have legitimately been raised by the applicant, without at the same time altering the ground rules which touch upon the "strategic" side of the equation, as enunciated by the respondent as its concern. If in spite of the expectations of the Board in this regard, however, there still arise individual cases where this adopted procedure for some reason does not result in a resolution of the issue, those situations will have to be dealt with - although with what might perhaps be termed a greater level of sensitivity to the issues of advance preparation and employee exposure than the Board at times has demonstrated in the past. While the Board's handling of the Employee List historically has adequately balanced the parties' interests on the issue of "gerrymandering", it has, as noted, for the most part failed to balance *that* issue against the issues of resource efficiency and employee vulnerability. The "waiver" process affords the Board a means of striking a more complete balance with respect to all of those competing concerns, while at the same time serving the broader interests of economy and efficiency for

the community at large. Should that “waiver” vehicle, in particular cases, be removed from the Board, the Board will have to make a simple call on when to communicate the List, on the basis of the concerns set out in this decision, and the view it has expressed of them.

DECISION OF BOARD MEMBER RENE R. MONTAGUE: March 16, 1992

1. This is a case where the applicant made a very simple request. The request was that it be provided with the employee lists as soon as they were received by the Board. The reasons it wished to be provided with the employee lists was:

- (1) so that it could properly identify and prepare any questions it may have had with respect to particular individuals being included on or omitted from the list;
- (2) avoiding exposure to the employer of who its inside advisor or supporter is; regarding section 113 [formerly section 111] of the Act avoiding disclosing that such employee is a member of or desires to be represented by a trade union.

2. The respondent had no objection to the applicant receiving a copy of the list at this time but requested as a *quid pro quo* that it receive at the same time a copy of the applicants Form 9 (“Declaration Concerning Membership Documents”). The only interest, by its own admission, that the respondent had in the Form 9 was to see the number of cards the applicant had filed in support of its application.

3. The majority decision very ably sets out what the Board’s past practice has been, its evolution and the rationale for the Board’s practice with respect to employee lists. Some of the passages cited by the majority bear repeating with appropriate emphasis. As cited by the majority the Board ruled in *Airline Limousine*, (*supra*):

14. In our view, there is no sound basis for denying a trade union the opportunity to review the employee list and, in practice, the union has always been given that opportunity. If a question arises concerning the list, the union has never been denied an opportunity to review it. Nor is there any good reason why it should not make a copy or take notes, so that it can pursue its inquiries, on its own time. We do not think that it makes sense to draw a distinction between *reviewing the list* and *taking a copy*, simply because the latter might assist a union in preparing its case or gathering information which could well result in a withdrawal of a challenge.

and further;

Adversarial attitudes are prevalent enough in our collective bargaining system, without elevating them to the status of principles. If, in the course of a certification application, a union is entitled to review the list - as we find that it is - it is our view that the union should be entitled to make a copy, and, again as a practical matter, a union has always been accorded the right to make a list of all unfamiliar names for the purpose of challenge and investigation.

5. These excerpts and others cited by the majority clearly establish the right of the applicant to be provided with the employee lists at some stage of the certification process. The majority decision confirms this as the practice of the Board and I agree with that decision. Where I must differ is in the artificial distinctions drawn to determine when the list is made available.

6. As the majority decision points out the list has lately been made available once the mat-

ter of the bargaining unit has been dealt with. The Board's client community has become accustomed to and largely accepting of this practice. Indeed the practice has proven to be an efficient and expeditious procedure which has enabled the Board to maximise its resources in the face of ever increasing demands for service from the community. It has also enabled the parties to narrow the issues in dispute and resolve differences, saving themselves time and money in expensive litigation.

7. The respondent in this case is fully aware of this practice and does not dispute the applicant's right to have access to the employee lists at a point in time. The respondent does, however, object to the applicant being provided with a copy of the list prior to finalizing the bargaining unit (unless it gets something in return). I fail to see what detrimental effect would result from the applicant receiving the list at the earliest possible time. If the applicant has access to the list up front it will only result in the differences being resolved sooner than later. The arguments about tactical advantages with respect to the appropriateness of the bargaining unit appear to me to be specious and without substance, especially in light of this respondent's willingness to allow access to the list on the basis of some sort of *quid pro quo* arrangement.

8. The determination of the appropriate bargaining unit is not one to be made by the parties. It is a question that is not simply a discretionary authority within the jurisdiction of the Board but is a mandatory obligation imposed by s.6 of the *Labour Relations Act*. The process of the Board invites submissions by the parties on this issue. It also encourages and recognizes agreement of the parties on the appropriate bargaining unit, this process makes labour relations sense. The authority to determine that unit, however, rests with the Board and as the majority have pointed out in their excerpt from *Metropolitan Separate School Board* the Board need not have regard to the wishes of either party in determining the appropriate unit.

9. The respondent's argument that providing the applicant with the list gives it a tactical advantage in discussions over the appropriate bargaining unit just doesn't hold water. The appropriate bargaining unit is determined by the Board and the submissions of the parties on that issue have to be relevant to the appropriateness of the unit for labour relations purposes. The Board is quite capable of distinguishing between arguments sufficiently relevant for labour relations purposes from those made purely for self interest in respect of the numbers required for certification.

10. The response the majority gives to "the traditional argument by employers that allowing an applicant trade union ... a copy of the Employee List opens the Board's process up to "abuse", by way of a "fishing expedition" for purposes of a subsequent application" is equally applicable to the concern over "gerrymandering" on the bargaining unit description. To again quote from the majority decision - "as long as the applicant gets to see a copy of the list at *some* point (as it must), and to note anything on it with which it "disagrees", the potential for "abuse" has always existed, and falls to be controlled in exactly the same way by the Board at present as effectively existed in the past."

11. It should also be noted that the respondent in this application could not point to one concrete example of the kind of abuse it anticipates. A review of the statistics as published in the Board's Annual Reports from 1986-87 to 1989-90 is illuminating when the certification applications are analyzed. Over the four years (1990-91 as yet unpublished) of the reports looked at the certification applications represent approximately 29% of all the applications/complaints before the Board. Roughly 67% of all the applications resulted in certification and approximately 90% of these were certified without a vote. This total does not include those certified pursuant to section 8 but only those where the applicant's membership evidence was of support by more than 55% of the

bargaining unit. This is hardly demonstrative of trade unions “abusing” the Board’s procedures by way of “fishing expeditions”.

12. The respondent itself does not raise any serious objection to the applicants request to have the list but merely insists that this involve some *quid pro quo* of the applicant giving something up in return. What the respondent wants is to be provided with the applicants Form 9 (“Declaration Concerning Membership Documents”). The Boards procedures and process have developed not only in the interests of fairness and efficiency but also in conformity with the Act. Subsection 113(1) of the Act is strong evidence that the legislature intended that trade union records relating to membership not be disclosed. Without commenting in any way on this particular respondents motives in requesting access to the Form 9 I would simply note that even a cursory examination of the history of the struggle for trade union recognition would reveal the explanation for this concern.

13. In fact, the argument was made by the applicant that through advance release of “employee lists” the trade union would not have to unnecessarily expose the inside organizer. In my opinion, there is also a serious risk of identifying the supporters of the union and exposing them to risks of retaliation and is particularly critical in small bargaining unit applications, by providing the applicants form 9 (Declarations Concerning Membership Documents) to the respondent. This is alluded to in the majority decision at paragraph 9. The Annual Reports of the Board show that of 1823 non-construction certifications issued over the four years 1264 were for bargaining units of fewer then 40 employees and in 893 cases the certifications were for units of fewer then 20. The concern over the unnecessary exposure of supporters is very real.

14. Further to the *quid pro quo* proposed by the respondent I would simply add that the policy and procedures of the Labour Relations Board were not developed as bargaining chips for either party to barter. They were developed by the Board in order to facilitate its processes in administering the *Labour Relations Act*. When a party to a proceeding before the Board proposes a change in the administrative procedure of the Board that would have the effect of increasing efficiency and expediting the process the onus should be on the party objecting to demonstrate some substantive reason why the request should not be granted. To quote again from *Airline Limousine* “Adversarial attitudes are prevalent enough in our collective bargaining system, without elevating them to the status of principles.” In the absence of any valid reason for not releasing the employee list I would grant the applicants request.

DECISION OF BOARD MEMBER ROBERT M. SLOAN: March 16, 1992

1. The history of this issue before the Board is indeed long and contentious, and I do not disagree that the Chair’s proposed method of balancing the interests involved through a logical extension of the “Waiver” process is a sensible one. I simply would not wish to be taken as necessarily subscribing to all of the Chair’s comments with respect to the “legitimacy” of the concerns expressed should the availability of the Waiver process in certain instances for some reason fail to resolve the matter. I would want access to a panel of the Board to continue to be an option available at the request of a party to settle unresolved issues.

1864-91-U Ontario Public Service Employees Union, Complainant v. Cybermedix Health Services Limited, Respondent

Adjournment - Practice and Procedure - Unfair Labour Practice - Union counsel requesting adjournment because he had only been retained the day before - In the circumstances, Board not satisfied that last-minute change of counsel warranting adjournment - Board concluding that neither employer's decision to change grievor's shift, nor its provision of written instructions to grievor improperly motivated - Complaint dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. H. Wightman* and *P. V. Grasso*.

APPEARANCES: *Melvin I. Rotman* and *Mustafa Khan* for the complainant; *W. G. Phelps*, *Mary Jayne Tome*, *Ramona Chiang*, *Marissa Laforteza* and *Robert Scott Donelley* for the respondent.

DECISION OF THE BOARD; March 11, 1992

I

1. This is a complaint under section 91 [formerly section 89] of the *Labour Relations Act*. The union contends that the respondent company has dealt with "the grievor", Mustafa Khan, contrary to sections 65 [formerly section 64], 67 [formerly section 66] and 71 [formerly section 70] of the Act. Those sections read as follows:

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express his views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

* * *

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

* * *

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a

member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

2. The grievor's complaint focuses upon two incidents:
- (a) on Friday, July 26, 1991 the grievor was informed that he would be moved from the evening shift to the night shift effective Monday, July 29, 1991; and,
 - (b) on July 30, 1991 Maria Laforteza, a day shift supervisor, gave the grievor (by then on the night shift) certain written instructions about the sequence in which his work was to be done when no supervisor was present.

The grievor alleges that his shift was changed because he is a union activist. The grievor alleges that *written* instructions were very unusual and therefore "discriminatory". The grievor alleges that both actions were designed to intimidate and penalize him, because he was exercising rights protected by the *Labour Relations Act* - in particular, filing numerous grievances under his collective agreement and making various complaints to the Ontario Labour Relations Board.

3. The company confirms that Mr. Khan is a union official and a member of the union's negotiating team. The company further confirms that Mr. Khan has made two applications to the Board and is a prolific grievor under the collective agreement. The company admits that it was well aware of the grievor, his union office, and his activities. Indeed, the company advised the Board that Mr. Khan has filed more than three dozen grievances, with a projected litigation cost of more than one hundred and fifty thousand dollars if all of Mr. Khan's complaints proceed to hearing. The company confirms that this is a substantial cost for a bargaining unit that now numbers twenty-five, and a business which currently faces serious financial difficulties. In the company's submission, many of these grievances (and, in part, the present complaint) stem from the fact that the complainant will not accept the legal limits on his work activities established by statute and confirmed in an earlier arbitration award.

4. The company concedes, therefore, that, from its perspective, the grievor has become something of a nuisance, and that his multiple grievances consume time, energy and money which could be better utilized to address the problems faced by both the company and its employees in a worsening economic environment. But the company maintains that neither of the matters specifically complained of had anything to do with Mr. Khan's union office, his union activities, his grievances, or his complaints. The company submits that the shift change was occasioned by the unexpected resignation of a registered technologist on the afternoon shift, which made it advisable to switch Mr. Khan to the night shift where he would have better technical supervision. The written instructions were a common means of communication between Ms. Laforteza, the day shift supervisor for routine chemistry, and employees on the night shift, including the grievor. The company submits that it was neither unusual nor inappropriate for Ms. Laforteza to leave the grievor written instructions about how his work was to be performed.

II

5. The issues in this case do not raise any novel legal principles, nor is it necessary to conduct a review of the Board's jurisprudence. It suffices to say that the company acted illegally if its actions were motivated, in whole or in part, by the grievor's union activity or the exercise of rights protected by the statute. (See, for example, the remarks of the Court of Appeal in *R v. Bushnell Communications Ltd., et al* (1973) 1 O.R. (2d) 442, aff'd at 4 O.R. (2d) 288.) Conversely, if the

company was acting for *bona fide* business reasons, untainted by “anti-union animus”, it does not matter that the grievor may believe that he has been treated unfairly or even that the company’s actions may be contrary to the terms of the collective agreement. The question is one of motive; and this, in turn, requires the Board to consider both the credibility of the company’s explanation for the acts complained of, and the credibility of the witnesses called to provide such explanation.

6. In assessing the credibility of the various witnesses, the Board has taken into account such factors as: the demeanour of the witnesses when giving their evidence; the clarity, consistency and relative plausibility of that evidence when subjected to the test of cross-examination; the apparent ability of the witnesses to resist the tug of self-interest or self-justification in framing their testimony; and what appears to the Board to be most probable in all the circumstances. On that basis, we prefer the evidence of Ms. Chiang, Ms. Laforteza, and Mr. Donelley wherever it is in conflict with that of Mr. Khan. We do not doubt that Mr. Khan was faithfully recounting the facts as he believed them to be; however, his suspicions were simply not in accord with the weight of the evidence.

III

Adjournment

7. This complaint was filed on August 30, 1991. In accordance with its usual practice, the Board appointed a Labour Relations Officer to meet with the parties to endeavour to effect a settlement. No settlement was reached, and by letter dated October 24, 1991, counsel for the company wrote to the Board, in part:

“On behalf of the Company we request that this matter be scheduled for hearing before the Board without delay. Mr. Khan’s perceptions of discrimination appear to be impossible to resolve through the grievance procedures between the parties and based on the multiplicity of other grievances which continue to be destined to arbitration even though identical earlier grievances have been denied by arbitrators, it appears that Mr. Khan will not take “No” for an answer from arbitrators either.

Accordingly we request the opportunity to appear before the Ontario Labour Relations Board and have the allegations raised in this Complaint and Mr. Khan’s perceptions heard and disposed of as soon as possible”.

8. The arbitration reference in counsel’s letter concerns an award released on August 28, 1991. That decision rejected various grievances in which Mr. Khan alleged that he had been unjustly disciplined, improperly denied the opportunity to perform certain job functions, and wrongly denied a promotion to the position of senior technologist. The arbitrator found that Mr. Khan was not a licensed Registered Technologist, and that therefore he was neither qualified for, nor legally entitled to, perform the work functions that he claimed. Nor was it a breach of the collective agreement to allocate or rearrange the grievor’s work having regard to the legal limitations on what he could do.

9. On November 4, 1991 the Board set this case down for hearing on November 20. By Fax dated November 5, 1991 counsel for the union requested an adjournment because he was not available on that day. Despite its earlier submission that the complaint should be dealt with quickly, the respondent consented to this adjournment request.

10. On November 13, 1991 the Registrar rescheduled this matter to come on for hearing on January 8 and January 27, 1991. These dates too were adjourned on consent.

11. By letter dated December 20, 1991 counsel for the union requested that the Board res-

chedule the matter to February 11 and 12, 1992. After further discussion between counsel, it was *agreed* that they were both available on February 12, 1992, and, if necessary, on March 19, 1992. Those hearing dates were confirmed by the Registrar as late as February 7, 1992, the week before the hearing was to begin.

12. On the morning of February 11, 1992 (i.e. the day before the hearing) counsel for the union advised that he would no longer be acting on this matter, and that the union would thereafter be represented by Mr. M. Rotman. On February 12, at the opening of the hearing, Mr. Rotman requested an adjournment because he had only been retained the day before.

13. Counsel for the respondent opposed this latest request for an adjournment, pointing out that the case had already been adjourned twice, and that the present dates had been specifically fixed in consultation with union counsel. The respondent was present with its counsel and witnesses, and was anxious to proceed. The respondent advised the Board that those witnesses would be much more difficult to assemble some weeks later because a significant portion of its facility was closing and the employees would be moving on to other employers. At the very least, it would be inconvenient to bring them to the Board again, and because they had portable professional credentials acceptable in other jurisdictions, it was by no means clear that they would even be available to give their evidence.

14. Counsel for the company further submitted that for labour relations reasons, it was important to have the grievor's complaint aired and disposed of, because it was interfering with both the company's business, and the delicate and difficult negotiations surrounding the business closure. There has already been a public demonstration which raised these complaints and accused the company of illegal conduct. The company was concerned that the allegations, if not promptly and definitively answered, might drive away its physician clients and further damage its business. Counsel submitted that the impugned conduct was really quite simple and straightforward; moreover, in accordance with the onus cast upon the respondent by section 91(5) of the Act, the respondent was prepared to proceed first and lead all its evidence before Mr. Khan was called upon to reply.

15. In all the circumstances, the Board was satisfied that the case should proceed as scheduled. We did not think that the complainant's last-minute change of counsel warranted an adjournment where, as here: the case was relatively simple and straightforward; there has been ample time to prepare, choose and instruct counsel; the case has been outstanding for some time; the hearing date was fixed on the specific agreement of the parties; the respondent, at some expense, was in attendance with its witnesses ready to proceed; it might be difficult and inconvenient to assemble those witnesses later; and there are good labour relations reasons for proceeding. Obviously, this is not a case in which there are serious damages or continuing liability, but an outstanding unfair labour practice complaint is an impediment to effective collective bargaining and we accept the company's submission that, in current circumstances, it should have a timely opportunity to answer the allegations which Mr. Khan has raised. The Board did, however, delay the start of the hearing, and extended the lunch period so that Mr. Rotman would have a further opportunity to consult with Mr. Khan, his advisor.

16. It will be convenient to sketch in some background, then deal with the complainant's allegations one by one.

IV

17. Cybermedix operates a medical laboratory which collects human specimens from nearby doctors' offices and conducts various tests on them. The company's operations are regu-

lated under the *Laboratory and Specimen Collection Centre Licensing Act*, R.S.O. 1980 c. 409, as amended. That Act is administered by the Ministry of Health and stipulates that certain tests must be performed only by registered technologists or employees having equivalent credentials (i.e. foreign qualifications which are recognized in Ontario).

18. The grievor is not a registered technologist. The grievor is not entitled to perform the functions/tests reserved by regulation to a qualified registered technologist. Nor is the company permitted to assign such duties to him - although the evidence indicates that for training and other purposes it has done so from time to time. The grievor's job classification is that of non-registered technician.

19. The grievor has been on the afternoon shift for some time. In the summer of 1990 his supervisor, Ramona Chiang, wanted to switch the grievor to the night shift, and give day shift preference to a registered technologist with less seniority but superior qualifications. The grievor protested, relying upon Article 8.06 of the collective agreement which then read:

Senior employees "excluding floats", will have the first opportunity of preference of shifts among vacant position(s) within their *present job* within the job posting period, or among vacant position(s) created by a lay-off.

This clause would not seem to support the grievor's claim, because his "job" as a non-registered technologist is not the same as the "job" of a registered technologist; however, at the time, Ms. Chiang relented and kept Mr. Khan on the afternoon shift. There he remained until July 1991.

20. It has always been controversial to allow non-registered persons, like the grievor, to perform work reserved by regulation to a qualified registered technologist. As early as 1987 the Ministry of Health conducted an inspection of the company's premises and advised, among other things, that *non-registered technologists* should *not* be conducting tests that, under the Act, only *registered technologists* (RT's) were permitted to perform. A similar Ministry inspection was carried out in early January 1991. Ms. Chiang was asked by the inspector if non-registered technologists were doing RT work, and, once again, the company was informed that this should not be allowed. The grievor's situation was specifically identified and discussed.

21. By the end of January 1991, therefore, Ms. Chiang was aware of both the Ministry's concerns and the fact that in the fall of 1990 the grievor had failed to pass his RT examinations. In Ms. Chiang's opinion, what the grievor was doing could no longer be treated as transitional training in anticipation of receiving his formal qualifications. He had tried to obtain formal accreditation, and had failed to do so. Accordingly, on February 12, 1991 she wrote to her supervisor as follows:

"The recent Ministry of Health Inspection has raised some concern with regards to Mustafa Khan. In the summer of 1990, Mustafa was transferred to the evening shift. During this time he spent six weeks on days covering vacations. Although not qualified as a Registered Technologist, Mustafa was allowed to perform RT duties. This was done to qualify Mustafa to write the CSLT Subject Chemistry exam, in October of 1990.

Despite the effort, Mustafa did not pass his Subject RT exam. In light of this, I feel that Mustafa be returned to a position as a Non-Registered Technologist.

This also raises concern, because there is not a position available for a Non-Registered person in Routine Chemistry. It also violates the Ministry of Health's Regulations on tests performed by qualified personnel only.

In order to comply with CSLT and the Ministry of Health's Regulations, I request that I be

allowed to rectify the situation as soon as possible. This would alleviate any possible action that could jeopardize our licence. Immediate action is imperative”.

On February 19, 1992 she addressed this letter to the grievor:

“In July of 1990 you were given the opportunity to receive additional training in the Routine Chemistry department.

This endeavour was based on the company’s desire to assist you in obtaining eligibility to write the Subject Chemistry exam for the Canadian Society of Laboratory Technologists.

It is our understanding that you indeed did become eligible to write this exam, and did so on October 16, 1990. On January 31, 1991 you advised us that you were not successful in passing the exam.

In light of the above situation, and in view of the Ministry of Health letter dated March 14, 1990 wherein they confirmed your classification as that of a technician as defined by Ontario Regulation 845, Section 1(d) (please see attached), you will revert to your former shift, and effective immediately, your training will cease and you will perform only those duties as outlined in the attached job description for a Non-Registered Technologist.

Mustafa, although your training will cease immediately, in order to give you notice for the change in shift we are willing to make your change back to the 11:00 p.m. to 7:00 a.m. shift effective on March 11, 1991”.

22. But as it turned out, the grievor’s shift was not changed in March 1991. In response to the grievor’s objections, Ms. Chiang decided that she could reorganize the grievor’s departmental duties so as to ensure that they could be monitored by the two part-time RT’s then on staff. Between them the two part-time RT’s covered the entire 8-hour shift. In Ms. Chiang’s view, these changes would accommodate the grievor’s desire to stay on the evening shift, yet still ensure a distribution of work that complied with the regulations. So long as one or the other of the two part-time RT’s was working on the grievor’s shift, his work could be adequately supervised. Thus, for the time being, there was no change in the status quo. The grievor remained on the evening shift.

23. In July 1991 one of the RT’s on the night shift unexpectedly resigned, and after examining the needs of the department, the company decided that his position would not be filled. But that posed a problem of work distribution on the evening shift, because there were no longer two RT’s to cover that shift, and the grievor was unable to perform the full range of RT functions or work without RT supervision. On July 26, 1991 Ms. Chiang wrote to the grievor:

“As you are aware, Chris Jeswani, R.T. on your present shift resigned this week. We have decided not to fill this position at this time. As a result of this, you no longer will have the supervision as required under the Ontario Regulation 845, Laboratory and Specimen Collection Center Licencing Act.

Although the Company’s past practice has been to give employees two weeks notice when shift changes are necessary, in this case we are unable to give you this notice. Therefore, effective Monday, July 29, 1991 your shift will change to 11:00 p.m. to 7:00 a.m. Monday to Friday.

Mustafa, it is unfortunate that this change must be made, however, as you well know, it is imperative that you have a registered technologist on your shift”.

24. Ms. Chiang testified that in view of the unexpected resignation there was little alternative to changing the grievor’s schedule so that he would continue to work with qualified RT’s. She testified that her decision was made for operational reasons - not Mr. Khan’s well-known union activities. We accept that explanation.

25. The evidence establishes that the company ordinarily tries to give employees at least two weeks' notice of shift changes, but operational exigencies like the one here, sometimes make that impossible. All of the witnesses confirmed that shift changes are sometimes made at short notice. So did the grievor on cross-examination. We find no basis for the grievor's assertion that he has been singled out in this regard, or that short notice was "discriminatory", or that there was something sinister in the way this shift change was effected. Ms. Chiang responded to an unexpected operational exigency in the way she considered appropriate, and while the grievor did not like her decision, it was not motivated by anti-union or other improper considerations.

26. Having considered the totality of the evidence, we are satisfied that Ms. Chiang's decision to change the grievor's shift was motivated by *bona fide* organizational considerations, and was *not* influenced, *in any way*, by the grievor's union activities, his grievances, or his OLRB complaints. The grievor has chosen to label "discriminatory" a variety of company decisions with which he disagrees and has suggested that he was being singled out or was the subject of a "witch hunt"; however, there is simply no evidentiary basis for these claims. No doubt the grievor feels himself aggrieved by various company decisions, and honestly believes that those actions are influenced by his union activities. But the grievor's belief does not make it so.

27. The same can be said of Mr. Khan's allegation that there was something sinister or discriminatory in the written instructions that he received from Ms. Laforteza. There was not.

28. The evidence establishes that, at one time, there were three registered technologists on the night shift. Those RT's decided among themselves how the work should be distributed. By the time Mr. Khan joined the night shift, there were only two RT's left. This provided appropriate technical supervision for Mr. Khan's work, but it disturbed the established work distribution because Mr. Khan was not permitted to do the full range of RT functions. There were also problems about getting the work done. According to Scott Donelley, one of the RT's (and a bargaining unit member), it "took [the grievor] twice as long to do the same amount of work". Mr. Donelley testified that the previous flexible work arrangements could not be maintained, with the result that some of the work was not completed and had to be left over for the oncoming day shift. It was this backlog or spillover which precipitated Ms. Laforteza's instructions to the grievor - and incidentally also caused her to raise similar production concerns with the two registered technologists on the grievor's shift.

29. The grievor asserts that a written instruction is most unusual, that it is "discriminatory", and that he has been singled out for special treatment. The grievor maintains that the reason for this "special treatment" is his union activity.

30. These allegations are totally unfounded.

31. The evidence establishes that it is not at all unusual for Ms. Laforteza to communicate with the night shift workers in this way, nor is there anything offensive about the particular instructions in question. They addressed a real productivity problem which was recognized by the grievor's fellow workers and is related, once again, to the fact that the grievor is not a qualified registered technologist.

32. Mr. Khan quarrels with these instructions (with their implicit criticism), has demanded further written clarification "to be on the safe side" and because "there is no harm in checking", and has penned his own responses. He clearly does not like being told what to do. But having considered the evidence, we are unable to find any basis for Mr. Khan's unfair labour practice allegations. Indeed, the uncontradicted evidence is that Mr. Khan is an individual who routinely demands that every communication with management be reduced to writing (or as he told the

Board, "put in black and white"). He is suspicious of the company, and the company, wary of grievances, has been inclined to accede to his request and put things in writing. Ms. Laforteza testified that she was mindful of the grievor's attitude when she provided him with written instructions. It is not for this Board to say whether an employer is obliged to communicate with its employees in this way, but, in the circumstances of this case, the company cannot be faulted for doing so.

33. For the foregoing reasons, this complaint is dismissed.

0140-91-R; 0387-91-U The Municipality of Metropolitan Toronto, Applicant v. Ontario Nurses' Association and Service Employees International Union, Local 204, Respondent v. Canadian Union of Public Employees, Local 79, Intervener; Ontario Nurses' Association, Complainant v. The Municipality of Metropolitan Toronto, Respondent v. Canadian Union of Public Employees, Local 79, Intervener

Sale of a Business - Remedies - Unfair Labour Practice - Nursing home's nurses represented by ONA - Metro Toronto's employees represented by CUPE in all-employee unit - Metro Toronto purchasing nursing home - Board observing that in two-union intermingling situations, it may give less weight to pre-existing status quo and employee preferences, and exhibit more concern about problems of fragmentation and establishment of sensible bargaining arrangements in new business context - Board declining to preserve nurses' bargaining unit at nursing home and declaring that CUPE represents the nursing home's employees, including the former ONA nurses - Board remaining seized with respect to effective date of declaration - Board dismissing unfair labour practice complaint based on failure of employer to treat new hires and transferees as coming under the ONA collective agreement

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *D. G. Wozniak* and *K. Davies*.

APPEARANCES: *D. Smith* for Metropolitan Toronto; *S. Shacter* for Ontario Nurses' Association; *J. Nyman* for CUPE; no one appearing on behalf of SEIU.

DECISION OF R. O. MacDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER D. G. WOZNIAK; March 25, 1992

Background

I

1. The trade unions mentioned in this decision will be referred to in abbreviated form as: ONA, CUPE, and SEIU. The applicant will be referred to as "Metro". The CR Vint Charitable Foundation will occasionally be referred to simply as "Vint".

2. This case is about the labour relations consequences which flow from Metro's decision to purchase an old age home called "Carefree Lodge" from the CR Vint Foundation. It concerns the effect of that transaction on bargaining rights held by CUPE and ONA; and, in particular,

whether the bargaining rights held by ONA should be preserved in the new institutional context. The matter comes before the Board as an application under section 63 of the Act, which was heard together with a related unfair labour practice complaint. Section 63 reads as follows:

63.-(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represent the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

(5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was

sold has changed its character so that it is substantially different from the business of the predecessor employer.

(6) Notwithstanding subsections (2) and (3), *where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses*, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

(7) Where a trade union or council of trade unions is declared to be the bargaining agent under subsection (6) and it is not already bound by a collective agreement with the successor employer with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and such notice has the same effect as a notice under section 14.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes as it considers appropriate.

(9) *Where an application is made under this section, an employer is not required*, notwithstanding that a notice has been given by a trade union or council of trade unions, *to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application* and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

(10) For the purposes of sections 5, 57, 59, 61 and 123, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 7.

(11) Where one or more municipalities as defined in the *Municipal Affairs Act* is erected into another municipality, the two or more such municipalities are amalgamated, united or otherwise joined together, or all or part of one such municipality is annexed, attached or added to another such municipality, the employees of the municipalities concerned shall be deemed to have been intermingled, and

- (a) the Board may exercise the like powers as it may exercise under subsections (6) and (8) with respect to the sale of a business under this section;
- (b) the new or enlarged municipality has the like rights and obligations as a person to whom a business is sold under this section and who intermingles the employees of one of his businesses with those of another of his businesses; and
- (c) any trade union or council of trade unions concerned has the like rights and obligations as it would have in the the case of the intermingling of employees in two or more businesses under this section.

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision thereon is final and conclusive for the purposes of this Act.

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

[emphasis added]

3. Metro claims that following the purchase Vint and Metro employees have been “intermingled” within the meaning of section 63(6) of the Act - indeed, that the Vint business and its employees have been totally absorbed by Metro, with the result that they now work side by side with Metro employees in a single, larger, consolidated operation. Metro and CUPE urge the Board to terminate ONA’s collective agreement, and/or redefine the bargaining structure so that the “Vint nurses” represented by ONA can be assimilated into the Metro-wide bargaining unit(s) represented by CUPE. ONA replies that there has been no “intermingling” within the meaning of section 63(6), but if there has, ONA’s right to represent nurses at Carefree Lodge should be preserved, or, in the alternative, extended to encompass some broader grouping of registered nurses employed by Metro.

II

4. Carefree Lodge is a home for the aged which, until 1991, was owned and operated by the CR Vint Charitable Foundation. The building is located in North York and had a capacity of 163 beds. Carefree Lodge was only authorized to provide residential (as opposed to “extended care”) services, and for some time, its occupancy rate was less than fifty percent. In August 1989, the Board of Directors of the CR Vint Foundation resolved to divest itself of the institution and requested proposals regarding the sale of the Home.

5. Metro operates a network of eight homes for the aged with approximately 2,300 beds and 3,700 employees. Metro also has 2 “satellite homes” with a further 160 “residential care” beds. The Municipality provides these services to its residents in accordance with the *Homes for the Aged and Rest Homes Act*.

6. By 1989-90, growing waiting lists and the escalating needs of existing residents prompted Metro to expand its facilities. Instead of constructing a new home “from scratch”, Metro decided to purchase Carefree Lodge, which it planned to renovate and adapt to meet the demands of its own clients and business organization. The extent of those changes can be appreciated when one compares the purchase price of Carefree Lodge with the cost of the renovations. Under the purchase agreement, Metro acquired “the property, the furniture, furnishings, fixtures and equipment, the inventoried supplies and merchandise, the operating equipment, ... and all other assets attributable to the business of [Carefree Lodge] ... “ for the sum of 1.5 million dollars. The renovations will cost 3 million dollars and will be phased in over three years. From a purely structural point of view, Metro’s Carefree Lodge is quite different from the institution run by Vint.

7. The purchase of Carefree Lodge was completed on January 31, 1991, and with the consent of the Ministry of Community and Social Services, the Home was changed from a charitable institution within the meaning of the *Charitable Institutions Act*, to a municipal home for the aged operated under the *Homes for the Aged and Rest Homes Act*. Metro was already authorized under that Act to provide these services, so, in this respect, Carefree Lodge was merely an extension of the Metro system.

8. As of the purchase date, Vint had a total of 29 employees working at Carefree Lodge: 13 full-time and 16 part-time. The 10 managerial, administrative and clerical personnel had no union affiliation. The remaining 19 employees were clustered in small bargaining units represented by SEIU or ONA.

9. At the time of the sale, SEIU represented a bargaining unit consisting of 12 full-time and part-time nurses' aides and RNA's. ONA represented a full-time registered nurses' unit with 2 members and a companion part-time unit with 5-7 members. (By the time this case was completed, the number of ONA members was reduced to 2 full-time and 3 part-time nurses). The recognition clause of the ONA collective agreement is as follows:

"The employer recognizes [ONA] as the bargaining agent of all registered and graduate nurses employed by the Lodge, save and except the Director of Nursing and persons above the rank of Director of Nursing. For greater clarity it is acknowledged that there are two certified bargaining units: (a) registered and graduate nurses engaged in a nursing capacity and regularly employed for not more than twenty-four hours per week (part-time); (b) registered and graduate nurses engaged in a nursing capacity and regularly employed for more than twenty-four hours per week (full-time)".

10. Vint/Carefree had no employees of its own engaged in housekeeping, laundry, maintenance or dietary services. These activities or functions were not, strictly speaking, part of Vint's business. They were performed on a sub-contract basis by employees of Beaver Foods. There were 37 Beaver employees, who had their own trade union and collective bargaining relationships. SEIU represented 6 full-time and 17 part-time dietary staff. An independent employee association represented 7 full-time and 4 part-time housekeeping staff. In summary, then, at the time of the sale, the Vint employees in the two small bargaining units represented by ONA, worked in conjunction with larger groupings of workers who were either unrepresented, were represented by another trade union, or were *working for another employer* as well as being represented by another trade union.

11. Following the purchase of Carefree Lodge, Metro began to renovate the premises to bring its services up to Metro standards and to make the Home an integral part of Metro's establishment. There were major structural changes. The number of beds was reduced from 163 to 120. Thirty-four of those beds were redesignated for residents who needed "extended care", and plans are currently underway to increase the number of "extended care" beds. Vint had no extended care beds or residents. It was not authorized to accept such residents or provide such services.

12. As a result of the purchase by Metro, all of the beds at Carefree Lodge are now occupied. There has been a sixty percent increase in the actual occupancy of the Home (from 73 residents to its full capacity of 120), together with a very substantial change in both the kind and level of care provided. The 73 residents "carried over" from Vint, now live in accordance with Metro's servicing, funding and residence rules. The Vint residents were maintained at Carefree because neither Metro nor the Provincial authorities considered it wise to move them. But Metro did not in any sense depend upon Vint for its resident/client base. Metro had its own needs and plans for Carefree Lodge. The services now provided at Carefree Lodge are those that Metro considers appropriate and these services are delivered in the manner prescribed by Metro.

13. Thirty-four of the new residents are legally blind. They were transferred to Carefree Lodge in accordance with arrangements that Metro made with the CNIB prior to the closure of the CNIB's Clarkwood Home in June 1991. The rest of the "new" Carefree residents came from Metro's own admission list. Metro maintains a centralized system for resident placement, applying

common criteria at the global level, then, in a more detailed way, at each home. There is no shortage of "customers". That is why Metro wants to expand its capacity - particularly for those residents requiring "extended care".

14. The initial renovations and organizational changes were completed by the fall of 1991; however, it is likely that the institution will continue to evolve in response to the needs of an ageing Metro population. According to Sandra Pitters, the Assistant General Manager of Metro's Homes for the Aged Division, an increase in the number of extended care beds is inevitable, as the overall number of residents increases, and more and more of them have stable chronic conditions requiring higher levels of direct health care. The renovations were undertaken with these developments in mind, and Metro continues to press the Province to designate all 120 beds at Carefree Lodge for "extended care residents". Metro also plans to expand the range of services to include an adult day centre for local senior citizens. It follows, therefore, that there are likely to be further changes at Carefree Lodge, to meet the needs of a growing, more dependent resident population.

15. As a result of the increase in the number of residents, the change in resident mix, and the adoption of Metro standards and programs, Metro has increased the level of nursing, house-keeping, dietary and social services provided at Carefree Lodge. The blind residents, in particular, have their own nursing, restorative, therapeutic and dietary programs. All of these services are now provided directly by Metro's own employees. The contract with Beaver Foods was terminated shortly after the Home was purchased.

16. In keeping with these organizational changes, there has been a dramatic restructuring of both the employee complement and collective bargaining relationships at Carefree Lodge. Instead of 29 workers employed by Vint (the predecessor employer), working with 37 workers employed by Beaver (a different employer), there are now 93 staff all directly employed by Metro (the successor employer). Of these, about 50 are "permanent full-time" complement, and another 43 are classified by Metro as "part-time". It should be noted, however, that within the Metro organization, the term "part-time" encompasses employees who are not part of the permanent complement but who may still work up to 40 hours per week. Accordingly, the number of workers that Metro labels "part-time" (i.e. not permanent full-time complement) may underestimate the current work level in the Home, and is not strictly comparable with the number of workers formerly labelled "part-time" by either Vint or Beaver. For example, a registered nurse working for Metro may well be designated "part-time", yet regularly work for more than twenty-four hours per week - the dividing line between "full-time" and "part-time" status under the ONA collective agreement. Thus, the increase in the number of employees working at Carefree Lodge - while significant in itself - may underestimate the volume of work now being done there.

17. A number of the Metro employees currently working in the renovated facility were simply carried over from the employee complement of Vint. Others were drawn from the employees of Beaver who chose to continue working at Carefree Lodge. In addition, existing Metro employees were given the opportunity to transfer and/or apply for positions at Carefree Lodge, pursuant to the CUPE collective agreements which cover some 11,000 employees throughout Metro. About 20 employees (including 4 managers) were transferred to Carefree Lodge from Metro's other homes for the aged.

18. With the exception of some of the registered nurses (who will be dealt with in more detail below), all of the employees at Carefree Lodge are now represented by CUPE. Pursuant to section 63 of the Act, the Board endorsed the agreement of Metro and the SEIU to transfer to the CUPE bargaining unit all of the former employees of Beaver and Vint who had been represented by the SEIU. The details of that agreement need not be reproduced here. It is set out in the

Board's decision of August 6, 1991. It suffices to say that the workers carried with them their accumulated seniority with their former employers, and were placed in job classifications in the CUPE bargaining unit most analogous to those that they had occupied at Carefree Lodge prior to the purchase by Metro.

19. As a result of the expansion of the former workforce, and the agreements with the SEIU, the two bargaining units represented by ONA remain a small minority in a sea of other employees represented by CUPE; moreover, Carefree Lodge is but one of a number of homes in the Homes for the Aged Division, and the Homes for the Aged Division is only one of the operating divisions of Metro. To put the matter in perspective: the "full-time" Metro/CUPE collective agreement covers 1,840 permanent employees in the Homes for the Aged Division alone, and (as of May 1991) applied to approximately 154 full-time registered nurses. The so-called "part-time" Metro/CUPE agreement covers 1,846 employees in the Homes for the Aged Division, including 290 registered nurses. CUPE Local 79 also represents several hundred public health nurses employed by the City of Toronto, and all of the employees of Riverdale Hospital, including nurses. Local 79 has more than 12,000 actively employed members.

20. The CUPE collective agreements are both open-ended "*all employee*" agreements which, together, nominally cover virtually all employees of Metro, including all those in the Homes for the Aged Division and therefore all of the registered nurses working at Carefree Lodge. As noted, the CUPE bargaining units at Metro encompass thousands of Metro employees and hundreds of registered nurses working in the Homes for the Aged Division and elsewhere. By contrast, the ONA collective agreement is restricted to "registered and graduate nurses employed in a nursing capacity"; but by virtue of section 63(2) of the Act, it too purports to apply to the registered nurses now working in Metro's Carefree Lodge. Both the CUPE and ONA collective agreements designate a union - CUPE or ONA - as the exclusive bargaining agent for registered nurses working at Carefree Lodge (albeit in bargaining units defined somewhat differently). Obviously, there is a conflict of bargaining rights which this Board must resolve.

21. Metro recognized that the purchase of Carefree Lodge would probably precipitate "successor rights" claims from one or more of the three employee organizations that represented employees working in the facility. Metro knew that it would be necessary to address those claims and determine the bargaining structure which would prevail when Carefree Lodge became part of the Metro establishment. With this in mind, Metro entered into discussions with the unions involved, and eventually resolved all outstanding issues respecting employees represented by the SEIU. There was no similar agreement with ONA - hence this application under section 63 of the Act.

22. While this application has been pending before the Board, Metro has preserved what it submits is the "collective bargaining status quo". For the registered nurses at Carefree Lodge who were represented by ONA at the time of the purchase from Vint (the "ONA nurses"), Metro has maintained the terms and conditions of employment that prevailed prior to the sale. Metro continued to apply the ONA collective agreement (since expired) to the "ONA nurses", continued to treat ONA as their bargaining agent, and continued to remit to ONA union dues on behalf of those nurses. The only significant exception involves the "ONA nurses" pension rights. As Municipal employees, the "ONA nurses" are now governed by legislation establishing the "Ontario Municipal Employees Retirement Fund" in which membership is compulsory. The legislation prescribes pension arrangements which supersede those that were applicable when Vint was their employer.

23. On the other hand, while Metro preserved the specific rights of those *individual* "ONA

nurses", as well as ONA's status as their bargaining agent, all of the other staffing at Carefree Lodge was done pursuant to the terms of the CUPE collective agreements (which, on their face, applied to *all* employees of Metro including those at Carefree Lodge - that is the conflict to which we have already referred). In other words, the ONA agreement was applied to the "ONA nurses" *as individuals*, but all of the other workers at Carefree Lodge were treated like other Metro employees for the purposes of payment, transfer, promotion, hiring, job posting and so on. The terms of employment applied or offered to them were those set out in the CUPE agreement. Metro anticipates that the transfers and/or new hiring will continue as the renovations proceed, and more extended care residents are added to the Carefree Lodge population.

24. Metro took the position that Carefree was not some detached, insular institution, at arm's length from the rest of the Homes for the Aged Division or from Metro as a whole. From Metro's perspective Carefree Lodge is now a *Metro* home for the aged. The programs provided at Carefree Lodge are *Metro* programs designed and delivered in accordance with *Metro's* standards to all of the current residents regardless of their origin. The physical structure is substantially different and many of the residents served there (the blind residents) were not part of Vint's business and could not have been part of Vint's business, because Vint was not authorized to accept them. From Metro's perspective, whatever the Vint business may have been, it has been totally absorbed into Metro's organization and transformed to meet Metro's requirements. Accordingly, with the exception of the "ONA nurses" Metro is allocating workers to Carefree Lodge, and in some cases hiring new employees to work at Carefree Lodge, as if they were all employees *of Metro*, with the terms and conditions of employment, mobility rights, and work assignment obligations of other employees *of Metro* - regardless of whether they happen to be assigned for the time being to work at Carefree Lodge. Thus, in addition to the two full-time and three part-time "ONA nurses" still at Carefree Lodge, two other registered nurses were transferred into Carefree Lodge from other homes for the aged (one has since transferred back) and a further six "part-time" (on Metro's definition) registered nurses were hired when Metro was unable to immediately secure enough nurse transferees pursuant to the posting and transfer provisions of the CUPE collective agreement. These additional nurses now working at Carefree Lodge, have all been transferred or recruited, and later treated, just like the other 450 nurses in Metro's Homes for the Aged Division covered by the CUPE agreements. To put it another way: their jobs were not considered an "accretion" to the ONA bargaining unit preserved by section 63; their jobs were not posted pursuant to the ONA collective agreement; and neither the direct transferees nor the new hires were paid pursuant to the ONA agreement. Among other things, this meant a different wage rate for those to whom the Metro/CUPE agreement applied, together with significantly different benefits - as perhaps might be expected for a bargaining unit encompassing thousands of workers, many of whom have the right to strike. (The current CUPE units mix employees covered by the *Hospital Labour Disputes Arbitrations Act* with those who are not, without any apparent labour relations difficulties, and some arguable advantage to the workers concerned.) It also meant that the "ONA nurses" are a minority of the nurses now working at Carefree Lodge.

25. According to Harold Ball, Metro's Director of Labour Relations, these recruiting initiatives were undertaken in accordance with Metro's understanding of its obligation under section 63 to maintain the *status quo* for those nurses represented by ONA prior to the purchase of Carefree Lodge and its incorporation into the Metro organization. He also indicated, however, that Metro anticipated real difficulties in transferring nurses from other homes or recruiting nurses for the jobs at Carefree Lodge, if those nurses were to be paid less than other Metro nurses, or if their employment prospects were limited to this one home. Quite apart from *Labour Relations Act* considerations, Metro considered it advantageous to both itself and the employees added to the Carefree Lodge complement, if their conditions and work opportunities were governed by the Metro-wide CUPE agreement.

26. Metro and ONA have not renegotiated the terms of the now-expired ONA agreement formerly concluded with Vint. Metro takes the position that under section 63(9) of the Act it is not required to bargain with ONA until the Board has resolved any conflict with CUPE's bargaining rights, and has determined which employees CUPE and ONA will represent in the new circumstances. In this proceeding, of course, Metro and CUPE both take the position that ONA's vestigial bargaining rights should be eliminated altogether, in favour of a broader bargaining unit encompassing all Metro employees. In their submission, the half dozen "ONA nurses" still working at Carefree Lodge, together with the new hires and transferees, should be in the same bargaining unit as the other employees working in Metro's homes for the aged, which, as mentioned, includes 450 nurses represented by CUPE.

27. The preservation of the name "Carefree Lodge", and the continuation of a home for the aged at the same location, both tend to mask the extent to which the institution has been transformed from the time it was run by Vint. We have already mentioned the substantial renovations to the physical premises, the changes in the size and make-up of the resident community, the shift to extended care services with the addition of 34 blind residents, the introduction of Metro standards and programs, and the consequent changes in the size and composition of the employee complement. These changes were ongoing while this case was before the Board, and there is no reason to doubt either their direction or effect. From an administrative and operational perspective, Carefree Lodge is no longer a free-standing independent institution. It has become totally integrated into Metro's network of homes for the aged. Indeed, apart from matters associated with the present dispute with ONA, Carefree Lodge is now being run very much like, and in conjunction with, Metro's other homes.

28. As might be expected in an organization with thousands of employees (3,700 of them in the Homes for the Aged Division alone - including hundreds of nurses and other professionals), Metro has an elaborate body of procedures which govern all aspects of its operation. Some of these are a function of Metro's size, Metro's regulatory and funding requirements, and the need to maintain organizational and political accountability. Others are designed to maximize economies of scale, ensure uniform service, and preserve the flexibility to adapt programs (e.g. meals on wheels or community health) to meet shifting client needs. We need not here detail the daunting list of policy manuals which now govern the operation of Carefree Lodge. It suffices to say that the organizational and managerial framework is quite different from what it was when the Home was operated by Vint. Conversely, the system of monitoring, accountability, and managerial control are no different from any other Metro home for the aged.

29. The management team installed at Carefree Lodge was drawn largely from existing managerial employees working in Metro's other homes. Like the other homes, Carefree Lodge is accountable to the General Manager of the Homes for the Aged Division, which is part of the Community Services Department. The General Manager directs the senior managers at the Division level who ensure that all homes comply with divisional standards and procedures. Divisional staff visit Carefree Lodge on a regular basis to assist the local management with program implementation. Initially, much of this contact concerned the ongoing renovations and the expansion of the resident base to include the blind and other clients admitted through Metro channels; however, Metro staff also monitor the ongoing workings of the Home. Regular visitors may include: the General Manager and/or Assistant General Manager of the Homes for the Aged Division, who visit on a monthly basis to oversee the operation; the Manager of Administrative Services, who provides support with respect to the computer and office systems established in the Home; the Manager of Resident Care, who assists the Director of Nursing in matters related to resident care and nursing practice; and various administrators or coordinators of social work, staff development, activation, building services, rehabilitation programs, and food services.

30. Carefree Lodge management (like managers in other homes) are expected to seek telephone advice and arrange visits on an as-required basis, from such divisional personnel as: the staff assistants who advise on matters related to personnel and payroll; the intake supervisor who advises on matters related to the admission process; and various personnel concerned with resident accounting, budget review, and purchasing. Each home, including Carefree Lodge, has a medical director and consulting physician; moreover, Carefree Lodge is now part of a central system for geriatric services and out-patient consultation with both medical and non-medical staff. There is a central pharmacy for all nine homes that dispenses drugs and maintains a centralized drug registry. There is also a centralized laundry service. Like other homes for the aged (and other Metro workplaces), Carefree Lodge uses the services of various Metro departments including Personnel, Treasury and Legal. Centralized computer services are available through Metro's "mainframe".

31. In order to ensure that all employees at Carefree Lodge understood their responsibilities and opportunities within the Metro organization, it was necessary to undertake retraining of those workers who had previously been employed by Beaver or Vint. A number of these sessions were scheduled to take place at Cummer Lodge, another Metro home for the aged located not too far from Carefree Lodge. While the employees were away on these orientation sessions, their positions were covered by other Metro staff.

32. The orientation sessions were designed to acquaint new employees with Metro's administrative structures, and to introduce the workers at Carefree Lodge to the practices and people with whom they will now be associated in either reporting relationships or on various committees. Carefree Lodge staff are now expected to attend monthly, inter-home meetings, in order to discuss management and policy-making for the Homes for the Aged. These meetings establish home standards and ensure that all Metro homes are being operated consistently. In addition, all nursing and activation staff can be sent, from time to time, to other Metro homes for on-site training.

33. The functioning of Carefree Lodge is subject to ongoing reviews, and there are a variety of reporting requirements that allow senior levels of management to monitor program delivery and keep in touch with what is going on at the Home. Insofar as personnel matters are concerned, the administrative processes at Carefree Lodge must now conform to established Metro norms. In the result, any significant decisions affecting employees (including job posting, promotions, demotions, or discipline) must now be discussed with, and approved by, Metro's Personnel Department before being implemented. Local policies must also conform to budgetary and labour utilization requirements. Various inter-home committees consider health and safety issues, record-keeping, budgeting, appropriations and purchasing, nursing care, staff development and training, and social work services.

34. Scheduling must necessarily be done to meet the exigencies of each home; however, within Metro's system it is not uncommon for personnel to be transferred from one home to another to meet local needs. The training sessions provide one example of this, but it is not at all unusual for "nursing staff" (which in Metro's case includes RN's, RNA's and NA's) to transfer temporarily to cover needs at another home (for example, an opening occasioned by educational or pregnancy leave). Nor is it unusual for part-time nurses in the Metro system (i.e., employees working up to forty hours per week) to work at more than one home in order to increase their hours or achieve a more desirable mix. There is an established practice of "twinning" homes that are geographically close, so that nurses and others can make up their hours or construct a more desirable work schedule. There is no reason to believe the practice at Carefree Lodge will be any different (unless the maintenance of a separate ONA unit precludes it); although, of course, until recently the situation has been in a state of flux because of the substantial renovations and organizational changes ongoing at the Carefree site.

35. The so-called “part-timers” in the Metro system typically work 32 hours per week. In the case of Carefree Lodge, the likely “twin” is Cummer Lodge, where the training sessions took place. The CUPE collective agreement has an elaborate seniority-based system for allocating available work to non-permanent staff. This is one of the recruiting advantages to which Mr. Ball referred. Under the CUPE collective agreement, part-timers have the opportunity not only to establish a more flexible work schedule, but also to accumulate, apply and transfer their seniority to other homes and to permanent work opportunities in the companion full-time (“permanent”) CUPE bargaining unit. There is also a job-sharing program for employees who find that option attractive. There is no reason to expect the situation to be any different at Carefree Lodge except to the extent that such initiatives might be inhibited or foreclosed by the maintenance of a separate bargaining unit of “ONA nurses”.

36. In order to provide continuous employee coverage and maintain Metro standards of care, Metro occasionally engages “agency personnel” (including nurses) on an as-needed basis; however, Metro’s policy is to discourage that practice, preferring instead to cover its short-term needs with personnel drawn from within its own organization. Metro has used agency nurses to cover extra shifts when the part-time nurses working at Carefree Lodge were unable or unwilling to increase the number of their nursing shifts, and Metro hopes to maintain that option. But Metro prefers to draw upon nurses from its other homes for the aged. Similarly, Metro hopes to be able to draw upon Carefree Lodge’s “part-timers” to cover exigencies at other homes. Again, there is no reason to expect these flexible work assignment practices to be any different for employees at Carefree Lodge except to the extent that they might be inhibited or foreclosed by the maintenance of a separate ONA bargaining unit.

III

37. For many years Metro has had a unified collective bargaining structure encompassing virtually all non-managerial employees. Those employees can move freely throughout the organization and they are all represented by CUPE, whatever position they may hold from time to time. Since the vast majority of former Vint and Beaver employees are now part of that bargaining structure, and Metro urges the Board to merge the “ONA nurses” as well, it may be useful to describe it in a little more detail.

38. Since the creation of Metro in 1953 and the transfer to Metro of large numbers of employees from its constituent municipalities, virtually all unionized employees have been represented by either CUPE Local 79 (predominantly white collar staff) or CUPE Local 43 (predominantly blue-collar staff). The Metro/CUPE bargaining structure currently encompasses some 11,000 employees, including hundreds of nurses and other professionals. Some of these employees - like pharmacists, nurses and RNA’s - have professional responsibilities to provincial regulatory agencies. Many of the members of CUPE Local 79 have professional, technical or graduate training which equals or exceeds that of registered nurses. CUPE is not a “professional union” like ONA, but neither is it any stranger to the representation of professionals - including nurses.

39. Apart from the approximately 450 nurses in the homes for the aged, there are nursing positions in community health, public health, occupational health, hostels, and perhaps elsewhere. Metro witnesses were unable to be very specific because in addition to “clear” nursing positions, there are a variety of managerial and non-managerial occupations for which nursing training would be useful, or at least relevant, and the CUPE units are not restricted to nurses “employed in a nursing capacity”. For example, Ms. Pitters is a registered nurse and nurses’ training would be relevant in a variety of counselling roles. For nurses who, for some reason or another (disability, for example) are either inclined or obliged to depart from the confines of their own discipline, there

are a number of transfer options. This is important for legal, as well as career development or compassionate reasons, because Human Rights and Workers Compensation legislation requires accommodation of disabled workers by providing alternative job opportunities.

40. Metro has general programs for career development and specific programs to encourage female employees to move into non-traditional areas; and with a job hierarchy as varied and extensive as the one covered by the CUPE/Metro agreements, there is ample opportunity for employees to broaden their career horizons, and acquire experience in different work settings. Conversely, the adverse employment effects of a contraction, reorganization or redistribution of work opportunities can be cushioned by reclassification or transfer to opportunities elsewhere within Metro, and within the CUPE units. The advantage to employees of extended area bargaining is obvious, as is the desirability of expanding the range of occupations over which employees may exercise seniority rights.

41. In fact, the CUPE/Metro relationship described above understates the degree of centralized extended area bargaining. The effective bargaining structure in Metropolitan Toronto, actually encompasses an additional five thousand employees employed by the City of Toronto. These employees are also represented by CUPE, and bargain together with Metro employees in a joint bargaining arrangement with CUPE, Metro and the City of Toronto.

42. This system of coalition bargaining flows from the functional, historical, and institutional connections between CUPE, Metro and the City, and results in both a co-ordinated bargaining strategy, and negotiated terms of employment which are substantially similar. This, in turn, facilitates employee mobility from one employee grouping to another, both within Metro and between Metro and the City. In both cases, congruent conditions of employment enhance the exercise and transfer of seniority-based rights from one job or location to another.

43. Because of the long-standing and comprehensive basis of CUPE's bargaining rights at Metro, there is a well-developed process of consultation both within the union (special nursing stewards, for example), and on a variety of union-management committees. Some of these are ongoing structures to involve the union in decision-making, address and adjust differences, and identify operational problems. The Joint Health and Safety committees has a statutory mandate. For more than two years Metro and CUPE have worked together to develop a "gender-neutral" job evaluation system to facilitate the implementation of Pay Equity. There are also institutional arrangements to promote employment equity across the system. Pay equity legislation contemplates plans based upon established collective bargaining structures: the more bargaining units, the more plans to be devised and harmonized, and the more parties whose interests must be accommodated. In Metro's case, it currently deals only with CUPE, and, effectively, one bargaining unit.

44. The ONA collective agreement is quite different from the CUPE agreements in both content and scope - not least because it applies only to "registered and graduate nurses" working at the home, and then only when they are "employed in a nursing capacity". At Metro, there is no such restriction, no ambiguity about the perimeter of the bargaining unit, and no possibility for jurisdictional disputes or competing union claims based upon different perceptions of what a nurse, an RNA, or other employee may do. Such matters are resolved within the confines of a single bargaining structure and collective agreements with one trade union.

45. The ONA collective agreement has different wage rates, a different salary grid, different shift differentials, different vacation entitlements, different job posting and scheduling arrangements, different pension disability and insurance plans (and carriers), a different dividing line between "full-time" and "part-time" employees and a different nominal differentiation between managerial and non-managerial employees. For example, "Head Nurses" are excluded from the

CUPE bargaining unit because, in Metro's view, they exercise managerial functions, but in the ONA collective agreement, the managerial exclusions begin with the Director of Nursing. As things now stand, the agreements have different expiry dates, which means that there will be a different collective bargaining cycle. According to Ms. Pitters, seemingly minor matters such as different holidays, make it more difficult to schedule on a team basis, because all of the other team members (including the new nurses at Carefree Lodge) work pursuant to the CUPE scheduling arrangements. The different work week and "part-time" definition have the same effect, and the separate unit makes it harder to set up the "pairing arrangements" applicable to other homes.

46. None of these differences between the ONA and collective agreements is particularly surprising given the different historical context in which the ONA agreement was negotiated with the CR Vint Foundation. On the other hand, if those differences were maintained, there would at the very least be serious labour relations difficulties for Metro, which would have to constantly adjust its personnel practices, both within the Home and generally, to take into account the different legal position of a small employee grouping which is otherwise functionally integrated into the Metro system. There is already some indication of that in the exchanges between ONA and Metro in connection with these proceedings, the application of the ONA agreement, the impact of the statutory freeze, etc. Of course, such difficulties could be eliminated if the terms of employment for all of the nurses working at Carefree Lodge were identical to those of nurses working pursuant to the CUPE agreement in the rest of the Metro organization, and if there was an agreement with CUPE to permit portability of seniority and related rights if a nurse was required to leave Carefree Lodge by reason of promotion, transfer, lay-off, etc. But that is not currently the case; and if it were, one might well ask why it was necessary to maintain two legally distinct bargaining units. Similarly, the Pay Equity problems associated with the addition to Metro's organization of another tiny female-dominated bargaining unit (for which a separate Pay Equity plan would have to be negotiated), might be eliminated if ONA agreed to simply consider its members to be part of the establishment represented by CUPE and agreed to adopt the gender-neutral job evaluation system which CUPE and Metro have already devised for Metro employees. But there is no undertaking to do that either.

47. As we have already mentioned, while this case has been pending before the Board, Metro continued to apply the ONA collective agreement to the ONA members as if they were a distinct and separate employee grouping. That, in itself, is awkward and inconvenient, not only because there are different wages, benefits, holidays, scheduling provisions, grievance procedures etc., but also because all other Metro employees (including the other nurses recruited or transferred to Carefree Lodge) have common terms and conditions of employment, and can be dealt with by Metro's "mainframe" computer. The machine manages all payroll calculations, hours of work, overtime items, employee deductions, unemployment insurance data, tax deductions, and so on. The computer also keeps track of the employees' accumulated seniority, sick bank, vacation entitlement, premium pay, and progression through the grid on anniversary dates. All of this is being done separately and manually for the small group of "ONA nurses" who continue to work at Carefree Lodge in accordance with the terms of the ONA agreement. According to Wanda MacKenzie, the Assistant Manager of Central Payroll, it would take Metro's systems analysts at least three months' work to re-program the computer monitoring system to process information from a separate and different bargaining unit at Carefree Lodge.

48. Of course, Metro could maintain a separate clerk to deal with the paper work generated by a separate bargaining unit covering nurses at Carefree Lodge. It could train personnel to administer the ONA agreement and deal with the separate grievance procedure. Metro could engage in separate negotiations, separate interest arbitrations, and so on for the nurses at Carefree Lodge, separately from the other nurses in the system. It could try to negotiate agreements with ONA and

CUPE to provide for portability of seniority and other rights, and to facilitate the transfer of workers, or work, in or out of a separate ONA unit at Carefree Lodge. It could negotiate a separate pay equity plan with ONA, or modify the existing one to meet ONA's concerns. It could involve ONA representatives on all of the employer-employee committees which currently consider matters of interest to Metro employees, as the "ONA nurses" have now become. It is simply a matter of training, expense and the allocation of labour relations personnel to deal with an ONA unit.

49. Counsel for ONA points out that Metro is a large, sophisticated well-funded organization which should be able to tolerate the administrative arrangements and costs associated with a separate ONA bargaining unit; moreover, the very size of the Metro/CUPE unit makes it necessary to recognize the special needs of nurses by preserving their own unit. And ONA is an experienced and established organization uniquely placed to represent nurses. Counsel for Metro describes this proposition as an "administrative headache" which is costly, unnecessary and totally inappropriate in the circumstances - which here include the fact that Local 79 already represents hundreds of nurses employed by Metro.

IV

50. For the purposes of this decision, we are prepared to *assume* that some or all of the current "ONA nurses" would prefer to continue to be represented by ONA. No direct evidence on this point is necessary. On the other hand, there is no evidence that any of the other nurses working for Metro at Carefree Lodge, or elsewhere, are members of ONA or wish to be represented by ONA.

The Application of Section 63

I

51. There is no dispute that there has been a "sale of a business" to which section 63 applies. Metro has acquired all or part of Vint's "business", and therefore is a "successor employer" within the meaning of section 63. The general effect of that section was described in *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581, in the following terms:

22. When a business or part of a business is transferred or disposed of, the transferee acquires it subject to the collective bargaining obligations of the transferor. A union holding bargaining rights for the employees of the transferor retains those bargaining rights for the employees in a "like unit" to that which existed prior to the transfer, and the transferee must continue to apply the collective agreement to that unit until the Board otherwise declares. This transfer and continuation of bargaining rights happens automatically upon the sale of all, or part, of the transferor's business. The Board may terminate the union's bargaining rights if the successor employer significantly alters the character of the business or part of a business acquired; however, until the Board otherwise declares, the transferee stands in the shoes of his predecessor with respect to established bargaining obligations. In this sense, a union's bargaining rights are in the nature of a vested right, which, by statute, "runs with the business".

The problem is to determine the consequences of this "successorship".

II

52. Section 63(2) and 63(3) are both concerned with preserving a union's right to represent employees in a bargaining unit when there is a change in the ownership of the business in which those workers are employed. When the employees in the bargaining unit are not covered by a collective agreement at the time of the sale, subsection (3) provides that the union continues to be the bargaining agent for the employees "*in the like bargaining unit in that business*". Where the subject

employees are covered by a collective agreement at the time of the sale, subsection (2) provides that the successor is “*bound by the collective agreement as if he had been a party thereto*”. Section 63(2) was added some years after section 63(3), and has the effect of preserving not just the union’s bargaining rights, but also the results of their exercise: the prevailing collective agreement.

53. The words in section 63(2) have been interpreted by the Board in a manner consistent with the language in section 63(3). The scope clause of the collective agreement preserved by section 63(2) is not applied literally to all pertinent employees of the successor after the sale, but only those of its employees who are at the time engaged in the sold business (see *Bryant Press Limited*, [1972] OLRB Rep. Apr. 301; *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887 at paragraph 24; and *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. Aug. 1060 at paragraphs 32-33). In *Caressant Care*, the Board observed that:

... It is only the employees of the business that was sold which continue to be covered by the collective agreement, just as in subsection (3) a trade union continues to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit *in that business*.

[emphasis in the original]

54. But the application of sections 63(2) or 63(3) may not resolve all of the labour relations issues which can result from the sale of a business. Section 63(4) and 63(6) address the complications which can arise when the successor employer is already engaged in a business at the time of the sale, and has established employment relationships or collective agreements which may conflict with the obligations inherited from the predecessor. Section 63(4) empowers the Board to resolve questions of definition in order to properly preserve the boundaries of the “like unit” which is maintained pursuant to section 63(2) or 63(3). Subsection (6) recognizes that new labour relations realities may make ineffective or undesirable the attempt to maintain the boundaries that have previously been established.

55. Taken together, sections 63(4) and 63(6) allow the Board to take a second look at the situation following a successionship in order to clarify, or if appropriate, redefine the bargaining structure. In *Essex County Board of Education*, [1969] OLRB Rep. July 552, the Board made these comments:

4. The purpose of section [63(6)] is to avoid that confusion which arises where employees represented by one trade union as their bargaining agent are intermingled with other employees who may or may not be represented by a bargaining agent. Hence, intermingling, whether it is factual or deemed by operation of section [63(11)], is a condition precedent to bringing an application under section [63(6)]. Once that condition is satisfied the Board then may exercise its powers under section [63(6)] and section [63(8)]. Intermingling then becomes one of the factors which the Board considers in determining an appropriate bargaining unit under section [63(6)(b)].

The exercise of the Board’s power under [subsection (6)(b)] may result in one or more new bargaining units containing elements of the bargaining unit for which rights are preserved by [subsection 2 or 3] as well as elements of an actual or inchoate bargaining unit of employees engaged in the business in which the successor was engaged prior to the sale. This redefinition of bargaining units will raise a representation issue which is not resolved simply by asking whether a sale of business has occurred and then determining the description of the bargaining unit affected by the sale. The remaining provisions of subsection 6 of section 63 empower the Board to resolve that representation issue and deal with the consequences of that resolution. In *Alliance Dairy Limited*, [1966] OLRB Rep. Aug. 336, the Board noted that it will not in every such case be necessary to conduct a representation vote in order to resolve this issue of representation.

5. The purpose of section [63] is, subject to the provisions set out in the section, to continue the bargaining rights of a trade union which had represented employees in a bargaining unit where the employer has sold his business. Bargaining rights thus are protected in the interest of stability in collective bargaining relationships. Where two or more bargaining units are, as the result of a sale and the intermingling of employees, merged into one, as in the instant case, both the need for stability in collective bargaining relationships and plain common sense would require that, where there is a large disparity in the size of the two groups of employees, there would be no representation vote, with its necessary expense, propaganda and disruption, but rather a declaration should be made that the trade union representing the great majority of the employees is to be bargaining agent for the new bargaining unit.

In the same vein, the panel in *Caessant Care*, *supra*, noted:

The focus of section 63 is on the *business*, and it is the practical problem of running two *integrated* businesses, either each ostensibly under a different collective agreement, or one under a collective agreement and one “non-union”, which would appear to have prompted the Legislature to provide the relief contemplated by subsection 6.

In *Loeb Inc.*, [1985] OLRB Rep. May 697 the Board observed:

Every existing collective agreement represents negotiated and entrenched rights and obligations on the part of all parties involved, and the Board’s jurisdiction to restructure the scope clauses of existing collective agreements, or otherwise affect the entrenched and negotiated rights of the parties, is to be found under the narrower provisions of section 63(6) of the Act. That subsection requires that an intermingling of the two or more operations in question has taken place, and as the Board articulated in, for example, *Caessant Care Nursing Home of Canada Limited et al.*, [1984] OLRB Rep. Aug. 1060 at paragraph 32, the Board for this purpose looks at whether the *work* or job opportunities themselves have been intermingled in the new form of operation.

III

56. There can be little doubt that the situation currently before us displays, at the very least, the kind of difficulties which are addressed by section 63(4). There is a problem defining the “like unit”, there is a conflict between the ONA and CUPE collective agreements, (which both nominally apply to the nurses working at Carefree Lodge), and there is a claim by ONA that the new hires and transferees fall within its jurisdiction. Indeed, ONA contends that it was an unfair labour practice for Metro to pay the new hires and transferees the CUPE rates and otherwise deal with them pursuant to the CUPE collective agreements.

57. But is there also an “intermingling” within the meaning of section 63(6) which *permits*, or in all the circumstances, *warrants* the exercise of the Board’s remedial authority (these are two separate questions)? To return to the language of the statute: has Metro intermingled the employees of one of its businesses with those of another of the businesses? And if it has, should the Board vary the bargaining structure or the parties’ bargaining rights?

58. In addressing these questions, we might observe, at the outset, that we have not found it very helpful to use the term “accretion” which counsel mentioned in argument and which can be found in a number of Board decisions under section 63(6). Not only does the word “accretion” *not* appear in the statute itself, but a perusal of those decisions suggests that it has been used in two different and analytically distinct ways:

- (a) to describe a situation which fits the opening words of 63(6), but does not require the Board to exercise its remedial discretion because the “intermingling” results in a “mere accretion” to a bargaining structure which can be sensibly preserved;

- (b) to describe a situation which may seem to fit a literal reading of the language of 63(6) but is not an “intermingling” at all, so that no remedial authority is available.

One usage has a jurisdictional flavour and the other does not.

59. In this case, of course, we have a two-union situation, with potentially overlapping collective agreements, and a plausible claim by both unions that there has been an “accretion” to *their bargaining units*, i.e. that the “new” (to each union) work group associated with the acquisition, belongs to the business and the bargaining unit for which that union has bargaining rights. ONA can claim the transferees and new hires are a “mere accretion” to the ONA bargaining unit established in Vint’s former business. CUPE can claim that the acquisition and metamorphosis of the former Vint business results in an accretion to its “all employee” bargaining unit with Metro. The label really doesn’t help us to determine the factual or legal issues posed by section 63(6): whether Metro has “intermingled” the employees of Vint’s business with those of Metro’s business (to return to the words of the statute), and if so, what the Board’s response should be. As the Board noted in *Essex County Board of Education, supra*, the fact of intermingling does not, by itself, require the Board to exercise its discretion in any particular way. Intermingling, once found, is but one of the factors to be considered.

60. We have read with interest the various cases to which we were referred, including *Caressant Care*, *Antonacci Clothes*, *Daynes Health Care Limited*, *Bermay Corporation Limited*, [1979] OLRB Rep. July 608, *Hamilton Cargo Transit Limited*, [1983] OLRB Rep. June 887, *Long-Year Canada Inc.*, [1979] OLRB Rep. March 225, and the decision of the British Columbia Labour Relations Board in *Boston Bar Lumber*, [1976] 1 Can. LRBR 380. In each of those cases the tribunal was called upon to consider the application of the intermingling provisions to the particular circumstances before it; and in some of the cases the Board expresses somewhat different views - or, at the very least, uses somewhat different terminology (compare *Bermay* with *Antonacci* at paragraph 27 and *Caressant Care* at paragraph 32). We do not think that any useful purpose would be served by reviewing those decisions here. Whatever view might be taken of the scope or ambit of section 63(6), we are satisfied that it applies here.

61. What was the Vint “business”? Vint provided 73 residents with a place to live (the institution was less than half full) and arranged for the supply of supporting services. Most of those services were not supplied by Vint itself with its own employees, but rather subcontracted to Beaver and delivered by Beaver employees. After the purchase by Metro, the former Vint residents still have a place to live, but now the available programs and services are those which Metro chooses to provide in the way Metro chooses to provide them: exclusively by its own employees who therefore perform some functions which are the same as those provided by Vint employees and some functions which were not previously performed by employees of Vint. Elements of Metro’s business - its programs and delivery system - have been infused into the Carefree Lodge organization and made available to the total residential community, including the residents inherited from Vint.

62. But these are not the only changes. The number of residents has been increased even though the overall capacity was reduced; and 47 of the new residents have themselves been intermingled with those who are already there. In the case of the extended care residents, the clients and their programs are a clear addition to those that were provided before because Vint was not authorized to provide “extended care”. The Vint “business” (however defined) has not only been added to the Metro organization, it has been completely absorbed and adapted. Former Vint, Beaver and Metro employees are now working side by side, and even if one focuses solely on the ONA unit, there has been an intermingling of ONA nurses with nurses employed by Metro. To suggest

that there has only been a token intermingling ignores the relative size of the pre-existing “ONA unit”, the complete integration of *all* the other employees inherited from Vint, and the likelihood of continuing further intermingling on a periodic and permanent basis. Carefree Lodge, as it is now operated, is an amalgam of elements from the businesses of Metro and Vint.

63. A few admittedly hypothetical examples will illustrate the problem which this poses under section 63.

64. Suppose an “ONA nurse” is involved in a program not formerly provided by Vint but now open to all residents? Are her activities part of Vint’s business or Metro’s? Suppose an “ONA nurse” provides services to the new residents - especially the extended care residents with special needs not formerly addressed by Vint? Is the work associated with this activity part of Vint’s business or Metro’s? Suppose a Metro/CUPE nurse has been transferred or hired to work at Carefree Lodge as part of the increased complement necessary to service the new residents, or implement Metro’s standards, but (as might be expected) she works with the former Vint residents as well? Is her work covered by the ONA bargaining unit/agreement, or the CUPE bargaining units/agreements, or both from time to time? And what of the nurse who is transferred from another home to Carefree and back again (which on our evidence has occurred and will continue to occur)? The fact is that the businesses and the employees have been integrated and “intermingled” in precisely the manner described in *Caressant Care*, *supra*. The Board there found an “intermingling” within the meaning of section 63(6), and so do we.

IV

65. There remains the question of whether or how we should exercise the remedial authority given to the Board under section 63(4) or section 63(6)(a)-(d); for as we have already noted, the existence of an “intermingling” or an apparent conflict of bargaining rights does not, in itself, demand that the Board modify the bargaining structure in any particular way. The Board is merely empowered to take a second look, and to realign the bargaining rights in a manner that makes industrial relations sense in the circumstances before it. What makes industrial relations sense in the facts before us?

66. Since we can exercise discretionary authority under both section 63(4) and section 63(6), we should note that sections 63(4) and 63(6) have a somewhat different emphasis, or at least different remedial possibilities. Section 63(4) is designed to *preserve* the like unit(s) with such revision as may be necessary to define or eliminate conflicts between established bargaining units. The terms of section 63(6) are broader, and contemplate the possible elimination of collective agreements, the termination of bargaining rights, or the realignment of bargaining units and bargaining agents to meet the new situation. In each case the Board must give appropriate weight to the status quo, but, at the same time consider the desirability of modifying the bargaining structure and representation rights to suit the new business situation.

67. Section 63(6)(b) contemplates that the Board will designate “one or more *appropriate* bargaining units”. The use of the term “appropriate” suggests an exercise that is similar to the one undertaken by the Board on an application for certification (see section 6). But the Board’s powers and functions are not the same, nor are there the same policy considerations, in “two union situations” like the one now before us. In *Kitchener-Waterloo Hospital* [1991] OLRB Rep. Oct. 1130 the Board put it this way at paragraph 46:

The considerations applied by the Board in determining an appropriate bargaining unit, under section 63(6)(b), must therefore take into account existing bargaining structures. It may well be, therefore, that the Board will find appropriate a bargaining unit, where there has been intermin-

gling under section 63, which it would not have found acceptable in certification proceedings. Too rigid an approach to describing the appropriate bargaining unit would undercut the purpose of section 63, to protect bargaining rights despite a change in legal ownership of a business. We must balance these two aspects, the need to protect bargaining rights and the need to determine an appropriate bargaining unit.

In *Kitchener-Waterloo* the Board ultimately refused to preserve a pocket of ONA nurses in two departments of an otherwise unorganized hospital where there were many other unrepresented nurses in other departments. The Board found that concerns about fragmentation (i.e. the problems associated with negotiating a separate collective agreement for this small “island” of “ONA nurses”) overrode the inclination to preserve bargaining rights. The Board terminated ONA’s bargaining rights without a representation vote; and its analysis is consistent with the approach of the British Columbia and Canada Labour Boards in cases such as *Boston Bar Lumber*, [1976] 1 CLRBR 380 and *Seaspan International Ltd.* [1979] 2 CLRBR 213, and the comments of former Ontario Labour Relations Board Chair G. W. Adams, Q.C. in *Canadian Labour Law*, at page 421:

When intermingling involves the merger of two groups of unionized employees, a board will look to the existing bargaining structure to decide if maintaining these separate units can be justified. The boards note that the choice of the employees regarding their bargaining agent should be honoured, unless to do so would undermine rational collective bargaining. Balanced against this recognition of the employees’ wishes is the preference for single, all-employee units. Where a conflict arises between these two policy goals, the interest of maintaining industrial peace prevails and undue fragmentation is avoided.

68. Where there is a successorship, intermingling, and a “two union situation”, the momentum to preserve bargaining rights, must be considered in relation to the express power to realign the bargaining structure to meet the new circumstances; moreover, that realignment will not raise the same concerns about access to collective bargaining that the Board mentioned in certification cases such as *Canada Trust Co.*, [1977] OLRB Rep. June 330, or *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250. The situation is more like the one before the Board in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, where two unions were competing and the Board observed:

Even where the Board has found that two competing applications propose appropriate bargaining units, it has exercised a discretion in favour of the more comprehensive bargaining unit in finding “the” appropriate bargaining unit for the purposes of section 6(1)... Surely where there are competing applications, the Board can be more concerned with the ideal characteristics of collective bargaining structures in that, whatever the decision, employees will not be denied access to the collective bargaining process.

In the instant case, for example, the issue is not whether the nurses will continue to be represented, but rather which union will represent them and what the bargaining structure will be. There is not the same concern about access to collective bargaining altogether or even whether they could sensibly fit into the CUPE bargaining units which already cover hundreds of nurses. This is not a situation in which a unionized group has been absorbed into a non-union one and we are asked to eliminate the former’s bargaining rights. Accordingly, in two-union intermingling situations like the one here, the Board may be disposed to give less weight to the pre-existing status quo and employee preferences, and exhibit more concern about the problems of fragmentation and the establishment of coherent, sensible bargaining arrangements in the new business context.

69. The Board has often favoured broader-based bargaining units even in certification situations where the shape of the unit may well influence whether there will be any collective bargaining at all. The structure of collective bargaining “matters”, as the Board noted in *Besiview Holdings Limited*, [1983] OLRB Rep. Aug. 1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

Likewise, in *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, a panel of the Board had this to say:

15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitably spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly-based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar, work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be

treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit.

Similar policy considerations were enunciated by the British Columbia Labour Relations Board (in a somewhat different context) in *Insurance Corporation of British Columbia*, [1974] 1 CLRBR 403:

The simplest reason favouring one overall unit is *administrative efficiency and convenience* in bargaining. All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units....A second administrative factor, this one clearly in the interests of both employer and employee, is the matter of *lateral mobility*. The presence of several bargaining units, each with their own seniority lists and different contract benefits, is an obstacle in the way of an employee's transfer or promotion out of the original unit into which he was hired. This limits the mobility of the employee....it also restricts management's range of selection among qualified persons to fill a job....The existence of a single bargaining unit facilitates the achievement of a *common framework of employment conditions* - vacations, statutory holidays, overtime, insurance scheme, pension plan, and so on....another factor favouring a single large unit is the objective of *industrial stability*. If there is one union and one set of negotiations, then the risk of strikes has to be less than if there are several unions negotiating separately. If there are two or more units representing employees in an operation which is functionally integrated, then if one unit goes on strike, it will put the employees in the other unit out of work as well (and even if they have nothing to gain from a strike because they have already signed their agreement)....These virtues of the employer-wide unit are significant, especially when considered cumulatively. However, they are not absolutely compelling. It is common to find certifications granted by this Board where narrower unit boundaries are drawn. The usual reason for that description of the appropriate bargaining unit is the Board's judgement about the *community of interest* of the employees. There is a simple explanation for the importance of this factor. The point of certification under the Code is to secure collective bargaining for the employees. Accordingly, the group on whose behalf this bargaining is to be carried on should include only those categories of employees whose interests can reasonably be reflected in one set of negotiations and whose working conditions can be incorporated into one document. If some groups differ greatly in background, skills, nature of work, method of payment, and so on, it may prove difficult to accommodate their interests in one bargaining unit....In each case, then, the Board must decide whether the distinctive needs of special groupings of employees are strong enough to outweigh the practical arguments in favour of one all-employee bargaining unit....

(See also *Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900, *Kidd Creed Mines Ltd.*, [1984] OLRB Rep. March 481, and *T.V. Guide Inc.*, [1986] OLRB Rep. Oct. 1451.) It is these factors which the Board must consider in conjunction with the pre-existing bargaining structures associated with the former business(es) in order to determine what the bargaining structure should be in the new circumstances.

V

70. We have weighed the practical and policy considerations referred to above, as well as the pre-existing status quo, and the evident desire of the "ONA nurses" to continue to be represented by ONA in their own bargaining unit. On balance, we do not think that the circumstances of this case favour the preservation of a bargaining unit consisting of registered nurses employed at Carefree Lodge, whether that unit is defined in terms of the "ONA nurses" working in the remnants of the Vint business still identifiable in the institution, or a somewhat broader unit encompassing all nurses at Carefree Lodge without reference to the origin of their work opportunities. Such unit description would artificially and unnecessarily divide the nurses from the other Metro employees at Carefree Lodge and elsewhere, including the other registered *nurses* employed in the Homes for the Aged Division and elsewhere.

71. In our opinion, the new organizational context requires a practical, workable and effective structure for collective bargaining. That would not result from the preservation of a narrow,

restricted unit confined to nurses at Carefree Lodge, detached from the main bargaining unit, but still substantially dominated by it; for there is no doubt that the substantive terms of employment for the nurses at Carefree Lodge would ultimately end up being very much the same as those of other Metro nurses - as indeed they should be, since their functions are the same and their jobs are integrated into the Metro organization. As CUPE pointed out, even a separate pay equity plan would have male comparators in the CUPE unit which would then, through pegging and maintenance, dictate the rates paid to the "ONA nurses"; and the "duty to accommodate" disabled workers would demand a transfer to the CUPE unit. These collective bargaining and employment law outcomes substantially undercut ONA's demand for a separate bargaining unit with all its attendant costs.

72. We simply do not consider it "appropriate" for collective bargaining purposes to sub-divide Metro's organization in the manner urged upon by ONA. From an operational point of view, we do not think that Metro should be required to deal separately with a tiny minority of its employees (which is also a tiny minority of its nurses), with separate negotiating processes, separate interest arbitration, separate grievance procedures, separate representation on employer/employee committees, separate salary administration, separate seniority lists, separate pay equity plans, separate seniority promotion and transfer arrangements, etc. Any such barrier erected around the nurses at Carefree Lodge would be totally artificial, impractical, and would impede orderly collective bargaining. This is not a matter of mere administrative convenience, but rather an illustration of the kinds of labour relations problems which flow from fragmented bargaining structures, and to which the Board should be sensitive (see again: *Kitchener-Waterloo Hospital, supra*, at paragraphs 47-48). We do not consider these problems to be trivial, nor is it relevant that it is the employer that has raised them. It is precisely because these problems are real that the Board will not usually consider classification or departmental employee groupings to be appropriate for collective bargaining, and has been exceedingly reluctant to subdivide an integrated work force into a number of small bargaining units.

73. Nor is there any substantial basis for ONA's alternative claim that the nurses' bargaining unit now confined to Carefree Lodge should be extended to encompass *all* nurses working for Metro - essentially "carving out" a unit of several hundred nurses from the established CUPE bargaining unit. It has not been the Board's practice to endorse such carve-outs even where a craft union seeks them (and would therefore be entitled to its craft unit as a matter of right in an unorganized situation - see section 6(3)), and there is no reason to do so here. Once again, concerns about the consequences of fragmentation override the desires of particular groups of employees to have their own bargaining unit. In any case, there is no indication that ONA represents even the "new hires" or transferees at Carefree Lodge, let alone the several hundred nurses employed at Metro's other homes for the aged, who are, of course, represented by CUPE.

74. Having regard to the foregoing, and pursuant to section 63(6)(a) of the Act, *the Board declares that Metro is no longer bound by the ONA collective agreement* preserved by section 63(2), and extended by the operation of the "freeze" provisions of the Act and/or the *Hospital Labour Disputes Arbitration Act*. It is the Board's intention that the "ONA nurses" formerly bound by that agreement, will now be covered by the CUPE "all employee" collective agreements in the applicable nursing classifications therein provided.

75. Pursuant to section 63(6)(b), the Board determines that the appropriate bargaining units for the employees of Metro, including those Metro nurses working at Carefree Lodge and affected by this application shall be the bargaining units defined in the recognition clauses of the CUPE collective agreements filed as Exhibits 2 and 3 in these proceedings. The "ONA nurses",

like the other nurses employed by Metro and represented by CUPE, will fall into one or other of those units depending upon their particular personal circumstances.

76. Pursuant to section 63(6)(c), the Board declares that CUPE represents the employees at Carefree Lodge to whom this application relates, and in particular, the “ONA nurses” formerly employed by Vint, and that ONA no longer represents them. No representation vote is necessary pursuant to section 63(8) because ONA represents only a miniscule minority of the employees in the appropriate bargaining units.

Retrospectivity

77. The parties have raised a residual question concerning the effective date of our declaration; that is, whether we can declare that ONA’s collective agreement ceases to bind Metro only as at the date this declaration is made, or in the alternative whether we *can* or *should* declare that the ONA agreement is no longer binding as at the date of the sale, or at some other date. There are plausible legal and policy arguments to be made in favour of each of these options.

78. In the first place, it must be remembered that the notion of “successorship” may create a legal anomaly potentially at odds with the established scheme of the Act. Ordinarily, the legislation demands that a trade union be the exclusive bargaining agent for a defined unit of employees. There is only one collective agreement at a time in respect of that defined unit, and therefore no uncertainty about either the scope of the unit or identity of the bargaining agent (see sections 42, 49 and 50 of the Act). The union is entitled to bargain on behalf of that group of employees, and the employer is obliged to engage in that bargaining process.

79. But a successorship creates a situation where the employer may become bound by two collective agreements with different unions, which nominally apply to some or all of the same employees; moreover, an intermingling of employees and/or the activities of the businesses, may make it difficult or impossible to apply the agreements consistently. That is why the Board has been given the remedial authority described in sections 63(4) and 63(6), and the employer is not obliged to negotiate with the union(s) until the Board has addressed the problem (see section 63(9)). A declaration effective as at the date of the sale would resolve any ambiguity associated with the intervening period, and would neutralize the consequences of any delays related to litigation. Neither party would benefit, or suffer from, the fact that the Board could not render a decision instantly after a sale, even if the application was filed immediately. Here, for example, it might be argued that the “ONA nurses” should be bound by the CUPE collective agreement from the date of the sale, and that they should be paid and otherwise dealt with accordingly.

80. On the other hand, a retrospective declaration might produce problems of its own (particularly if the litigation itself was time-consuming), and may not be consistent with either the terms of the Act or its policy objectives. Just as employees not previously bound by a particular collective agreement might claim retroactive benefits under it, so persons who nominally had the protection of a collective agreement may later find that they did not. The language of the statute suggests a temporary preservation of the status quo (see section 63(2), 63(3) and 63(9), not the *ex post facto* imposition of something different; and it would certainly seem odd if employees discovered later that they had been “overpaid” or “underpaid”. And, of course, in either scenario, it may be difficult to reconstruct what might have been.

81. In the instant case, the parties have asked us to remain seized of this aspect of the remedy, i.e.: whether a declarations that effectively terminate ONA’s bargaining rights and merge the ONA nurses into the CUPE units should operate from the date these declarations are made, the date of the sale, or some other date. The parties requested the opportunity to pursue this matter

among themselves before addressing the Board and that is certainly a sensible thing to do. We therefore remain seized of this aspect of the remedy, and will address the issue only if necessary.

The Unfair Labour Practice

82. ONA alleges that Metro's response to the acquisition of the Vint business (pending the Board's decision) breaches sections 15, 50, 63, 64, 66, 67, 79 and 89 of the *Labour Relations Act*, as well as section 13 of the *Hospital Labour Disputes Arbitrations Act*. ONA complains that Metro advised ONA that it wished to incorporate the ONA nurses into the CUPE collective agreement (i.e. the result we have declared above). ONA complains that the new hires and transferees have, without ONA's consent, been added to the employee complement at Carefree Lodge pursuant to the CUPE collective agreement rather than the job posting provisions set out in the ONA agreement. ONA complains that these individuals should have been hired and paid pursuant to the ONA agreement. ONA complains, conversely, that Metro has failed to offer the ONA nurses the rates of pay prescribed under the CUPE agreements but rather has continued to pay them at the rates that ONA negotiated with Vint. ONA complains that the "ONA nurses" were not offered the same terms as the new hires/transferees. ONA complains that Metro has refused to table proposals or otherwise engage in collective bargaining with ONA following the sale, but has bargained with CUPE.

83. There are a number of difficulties with ONA's position.

84. As we have already mentioned, the application of section 63 creates an anomalous legal regime lacking a precise definition of the resulting bargaining unit(s), the application of the collective agreements, and the rights of the bargaining agents. Indeed, it is precisely because Vint's business has been integrated and its employees intermingled with the business and employees of Metro that these definitional problems arise. The statute contemplates that with a "sale of a business" there will be legitimate issues of recognition or collective agreement administration which only the Board can sort out, and Metro made a timely application to the Board as soon as it became clear that its dispute with ONA could not be settled otherwise. Once that application was made, Metro was no longer obliged to bargain with ONA on behalf of any of the "employees concerned by the application".

85. ONA'S claim also overlooks the fact that at all material times, Metro was also bound by a collective agreement with CUPE which, nominally at least, applied to all of the employees at Carefree Lodge including those whom ONA asserts should be an accretion to its bargaining unit. The purchase from Vint did not negate any legal rights previously held by CUPE and its members. Those, too, were matters for consideration by the Board under section 63(4) and 63(6).

86. In keeping with the thrust of section 63, Metro sought to preserve the status quo pending a resolution of the case before the Board. As a *first approximation*, Metro continued to apply the ONA collective agreement to all of the former Vint employees who had been represented by ONA, and the CUPE collective agreement to all of the new hires and transferees from the CUPE bargaining unit. That, we might note, would appear to be consistent with the Board's description of the "status quo" in *Bryant Press*, *Antonacci Clothes*, and *Caressant Care*.

87. Now, it might be argued that Metro's approach lacked the precision which the statute requires. Metro did not try to dissect the day-to-day functions of the nurses on an individual basis, to see whether their tasks were traceable to Vint's residential regimen, or had their origin in the changes introduced by Metro. Metro did not try to unravel the Vint elements and Metro elements from what was now a merged and fully integrated organization, or to delineate precisely when nurses were working in the Vint business or the Metro business into which it had been assimilated.

Metro did not, for example, pay the transferees at the ONA rate when they were performing services for Vint residents that ONA nurses had done before, but at the CUPE rate when they served the extended care residents whom Vint had not been legally authorized to accept. Such efforts would have made no sense for a labour force that had become functionally integrated, and we do not think that it was required by the *Labour Relations Act*. The Metro solution was a reasonable one in these circumstances - particularly since Metro moved promptly to put the problem before the Board, settled a similar dispute with the SEIU (on terms much like our declaration above) and proposed to ONA the very result which we have found to be appropriate. The fact is, that if the Board had been able to render an immediate decision, none of the interim measures implemented by Metro would have been necessary or could have been the subject of a complaint. All of the new hires/transferees and all of the ONA nurses would have been dealt with pursuant to the CUPE collective agreement and ONA could have been ignored. Instead, Metro continued to recognize ONA as the representative of the "ONA nurses", continued to forward union dues to ONA, and continued to apply the ONA agreement to those to whom it had been applied before while the case was before the Board. The ONA agreement was inferior to the CUPE agreement in many respects, but that consequence has nothing to do with Metro, nor is Metro required to rectify it at the bargaining table until the Board's decision is released.

88. In all of the circumstances, we are not persuaded that Metro's actions constitute a breach of any provision of the *Labour Relations Act* or the *Hospital Labour Disputes Arbitration Act*, but even if its response to the sale did constitute a technical breach of one or more of those provisions (for example - the application of the "freeze" provisions to this unusual situation), we do not think that any remedy would be appropriate. The section 89 complaint is therefore dismissed.

DECISION OF BOARD MEMBER KAREN S. DAVIES; March 25, 1992

1. Having had the opportunity to read the decision of the majority I must dissent from their decision. I disagree with the result and with the reasoning that I feel has been simply misapplied to the facts of this case. I shall begin with an interpretation of the purpose of section 64 [previously section 63] and policy considerations that underlie the Board's decision whether or not to exercise its discretion under section 64 [previously section 63] of the Act. The simplest way to do that is to quote from some authorities on the issue. George Adams in *Canadian Labour Law*, sets out these considerations this way:

• • •

When intermingling involves the merger of two groups of unionized employees, a board will look to the existing bargaining structure to decide if maintaining these separate units can be justified. The boards note that the choice of the employees regarding their bargaining agent should be honoured, unless to do so would undermine rational collective bargaining (*Oshawa Wholesale Ltd.*, [1965] O.L.R.B. Rep. Feb. 584). Balanced against this recognition of the employees wishes is the preference for single, all-employee units (*Regional Municipality of Sudbury*, [1981] O.L.R.B. Rep. Mar. 251). Where a conflict arises between these two policy goals, the interest of maintaining industrial peace prevails and undue fragmentation is avoided (*Boston Bar Lumber*, [1976] 1 Can. L.R.B.R. 380 (B.C.)). The criteria to be applied in determining the appropriate bargaining unit are not identical to those used in certification proceedings. While the boards may indeed consider these certification criteria, priority must always be given to the existing bargaining rights to the extent they can be reasonably accommodated within the new employment structure (*City of Peterborough*, [1979] O.L.R.B. Rep. Feb. 133). Thus, a bargaining unit which would be inappropriate on a certification may nonetheless prevail if it has proved itself workable in the circumstances. Some of the criteria to which the boards look are similarity in job functions; shared community of interests; the employer's preference (for a single unit); and the nature and degree of integration. Further, the length of the bargaining units existence in

any given business will be weighed when considering the consequences flowing from existing benefits, (such as seniority, pensions and insurance) (*City of Peterborough, supra*). Unless compelling reasons can be shown to justify the maintenance of separate bargaining units, employees performing the same job function will be grouped into one unit. Instances where separate units have been maintained include where the degree of intermingling is and will continue to be negligible (*City of Peterborough and Oshawa Wholesale*); where there is significant decentralization of the employer's administrative structure so that a corresponding fragmentation of units is viable; and where there is a history of multiple units being workable within the employer's structure. A key factor to this determination is the size of the employer and its ability to deal with a plurality of units. The larger the employer the more predominant the issue of the shared community of interests and the need for specialized units, (*Pacific Western Airlines Ltd.*, [1980] 3 Can. L.R.B.R. 180 (Can.).

Intermingling occurs where a "business" is sold within the meaning of the successor provisions of a labour relations statute, and the employees covered by the collective agreement relating to that business are mixed or "intermingled" with the pre-existing workforce of the successor employer. Although "*the central character of the intermingling concept*" is the "*mixing of members of two unions or persons covered by separate collective agreements who perform the same job function*" (*Eastern Canada Towing Ltd.*, (1977), 24 di 152 at p.162.), "intermingling" is to be given a "liberal and broad interpretation" (*Airwest Airlines Ltd.*, [1981] 1 Can. L.R.B.R. 427 (Can.). Therefore, intermingling provisions also apply to the absorption of a group of unionized employees into a non-unionized workplace. *The Board has said on numerous occasions that the purpose of section 64 [previously section 63] of the Act is to preserve not extend bargaining rights. The bargaining rights being preserved in this case are those of the employees of the transferred business.*

[emphasis added]

2. Further authority on the purpose of section 64 (then section 55) and the factors that are considered in its application can be found in a Paper presented by Rick MacDowell, at pages 38 to 39, the Fourth Annual Institute on Continuing Legal Education (Canadian Bar Association - Ont.) on *Labour Law: Aspects for the General Practitioner*. It was held at the Toronto (Harbour Castle) Hilton on April 5th, 1979:

• • •

"The Board has consistently held that great weight will be given to preserving the existing bargaining structure. The island of collective bargaining will be considered *prima facie* appropriate and will be maintained if there is a reasonable basis for preserving its identity. In making its determination the Board will not apply the same criteria as would be applied if the union had sought certification for the subject employees. Thus in *Loblaws Groceries Co. Ltd.*, [1973] OLRB Rep. Jan. 13, the Board preserved a union's bargaining rights in a single retail food store in Windsor and declined to redefine the bargaining unit to include all stores in the municipal area even though that is what it would have done had the union applied *de novo* for certification for that single store.

In *City of Peterborough*, [1979] OLRB Rep. Feb. the franchisee who ran the city bus service failed to renew the franchise agreement and the city decided to run the service directly. A transfer was effected which the Board found to be "sale" of a business and, as a result, the drivers, mechanics, etc. became employees of the city. There was no actual intermingling with other city employees, but there was an apparent conflict of bargaining rights. The bargaining agency for the drivers was the A.T.U., but CUPE already had an agreement with the City which purported to apply to all city employees. The Board treated the matter under section 55(4) and in preserving the A.T.U.'s position in the transit operation (only) remarked:

The consistent point of departure in the decisions of the Board in applications under section 55 of the Act is a recognition that the primary purpose of the section is the preservation of employees' bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to a bargaining agent not of their choosing.

Thus while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have regard to all of the criteria that apply to that determination in certification proceedings it must also, having regard to the purpose of section 55, seek to balance the interests of the employees of the transferred undertaking and their union. In other words, in the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structures. (*Oshawa Wholesale Ltd.* [1965] OLRB Rep. Feb. 504; *The Corp. of the City of Kitchener* [1973] OLRB Rep. June 306; *YarnTex Perth, Division of YarnTex Corporation Ltd.* [1975] OLRB Rep. 137).

Of particular concern in the determination of bargaining units under section 55 of the *Labour Relations Act* is that existing bargaining structures not lightly be interfered with.

[emphasis added]

3. The majority decision places a great deal of emphasis on certain of the criteria mentioned and completely ignores others. For example, G. Adams refers to the policy need to maintain industrial peace and the preference for single, all-employee units influencing whether the Board will preserve bargaining rights or merge them in the face of the employees' wishes. This would seem to be the primary basis for the majority decision in this case and one which is erroneously applied. The criteria to be considered (similarity in job functions; shared community of interests; the employer's preference (for a single unit); and the nature and degree of integration) have not been accorded anything like equal treatment in the majority decision, particularly on a close analysis of the facts in this case. This has resulted in an unfair balancing of the interests of the parties to this application.

4. The majority at paragraph 50 have assumed "that some or all of the "ONA nurses" would prefer to continue to be represented by ONA". I would agree with that assumption. While direct evidence of those employees would have been preferable I believe it is a fair assumption to make. Parenthetically I would simply note that ONA is the certified bargaining agent of the nurses at Carefree whereas CUPE's representation of Metro's employees is the result of voluntary recognition by the employer. None of the nurses at Carefree saw fit to file an intervention so the logical conclusion, absent any evidence to the contrary, is that they are satisfied with ONA's representation of their interests.

5. In terms of the intermingling of employees it is important to define which employees have been intermingled. Is it the intermingling of any employees that is significant or should attention be focused on those employees that are or should be in the bargaining unit in respect of which the section 64 [previously section 63] application is made? The "...central character of the intermingling concept" is the "mixing of members of two unions or persons covered by separate collective agreements who perform the same job function", (*supra*). The importance of making a distinction in the present case is that there is no doubt that some intermingling of the employees of the predecessor and successor employers has occurred. In the case of the predecessor employer there were two bargaining units. A nursing unit represented by ONA and a unit made up of other employees represented by the SEIU. In the case of the successor employer, Metro, there is only one bargaining unit represented by CUPE. This bargaining unit represents all of Metro's unionized employees including nurses. The intermingling which has taken place has been predominantly among the unit at the nursing home previously represented by SEIU and Metro employees, who would fall within the scope of this unit, represented by CUPE.

6. A look at the evidence reveals that if any intermingling of nurses has occurred it has

been minimal and largely as a result of Metro's failure to respect the collective agreement that exists with respect to the nurses at Carefree represented by ONA. At paragraph 17 of the decision the majority indicate that there has been a transfer of 20 employees from Metro's other Homes for the Aged to Carefree. While it is mentioned that 4 of these are management it does not distinguish between the rest in so far as their job function is concerned. The applicant's exhibit #22, "Staff Transfers from Other Homes in the Homes for the Aged Division", reveals that only two of these were Registered Nurses who would be performing the job function at issue. The evidence of the applicant's witness was that she believed that these were part-time employees.

7. Another exhibit of the applicants, #21 - Carefree Lodge Employees as of July 31, 1991, shows that of the 93 employees there as of that date there were 13 RN's, four full-time and 9 part-time. These employees included new hires. At the time, the number of "ONA nurses", to adopt the terminology of the majority, was 5, 2 full-time and 3 part-time. A comparison of exhibits 21 and 22 and a little arithmetic reveal that 2 of the full-time nurses and 4 of the part-time nurses were new hires. Metro chose to hire these nurses under the terms of the CUPE collective agreement rather than the ONA collective agreement.

8. In the words of section 64 [previously section 63] of the *Labour Relations Act* "the person to whom the business has been sold is, *until the Board otherwise declares*, bound by the collective agreement as if he had been a party thereto...". Section 64 [previously section 63] does not contain an exemption for situations where the successor employer is bound by a different collective agreement with a different bargaining agent and there may arise a conflict as to which collective agreement to apply. It does not provide the employer with a discretion as to which parts of the collective agreement it must apply or which it may apply. The employer is bound by the whole agreement "as if he had been a party thereto". To borrow the words of the Board in *Vaunclair Meats Limited* (cited at para. 51 of the majority). "In this sense, a union's bargaining rights are in the nature of a vested right, which, by statute, *"runs with the business"*."

9. I believe the analysis of the majority and their application of the cases cited at paragraph 53 is flawed. In those cases, made explicit in the excerpt from *Caressant Care*, the conflict between the collective agreements is resolved by applying them to the employees of the sold business and the employees of the person to whom the business was sold respectively. When an intermingling of the two workforces occurs you have the problem that section 64 [previously section 63] was designed to address. The impracticalities of having employees performing the same or similar job functions for the same employer in the same workplace require resolution. Those cases do not address the issue of new hires such as we have here.

10. In paragraphs 22 through 24 the majority set out Metro's interpretation of its obligation under section 64 [previously section 63], in the words of the majority "to maintain the *status quo*" for those nurses represented by ONA prior to the purchase of Carefree Lodge". With all due respect to Mr. Ball I do not think he got it right. By definition *collective* bargaining rights cannot attach to individuals. The collective agreement to which Metro became bound on purchasing Carefree was not between ONA and the employer on behalf of certain individuals but was between ONA and the employer in respect of a bargaining unit. This comment is made to highlight the reason for the numbers of what the majority have elected to call "ONA nurses" and "CUPE nurses" at Carefree Lodge. It would be somewhat specious to rely on these numbers and the situation created of having nurses working side by side but subject to different collective bargaining regimes as a basis for analyzing whether intermingling as contemplated by the Act has occurred.

11. The employer's creation of a *de facto* intermingling situation, when there would not be one if it had applied the ONA collective agreement in its entirety to the new hires at Carefree,

should not usurp the Board's role of determining the appropriate declaration to make pursuant to a section 64 [previously section 63] application.

12. Also, paragraph 25 states that Metro considered it advantageous to both itself and the employees added to the Carefree Lodge complement if their conditions of work and opportunities were governed by the Metro Wide CUPE Agreement. Clearly here Metro thinks it has the right to act on behalf of the employees. To my understanding Metro is not their bargaining agent. Metro in this instance has created their own problem by implementing two collective agreements for Nurses.

13. It is appropriate at this point to highlight some of the evidence given by the applicants own witness, in respect of "the real difficulties in transferring nurses from other homes or recruiting nurses for the jobs at Carefree Lodge".

14. Ms. Pitters was questioned about registered nurses working in more than one home. Her testimony was that this only occurred where two homes had been twinned and they were only twinned if in close proximity to each other. She further testified that this only involved part-time RN's and that lateral transfers between homes were considered for personal reasons and sometimes for increased hours in the case of part-time nurses.

15. This evidence leads me to believe that transfers between homes are not nearly as frequent as might be assumed from Mr. Ball's testimony. I should say that this is not meant to indicate that Mr. Ball intended to mislead the Board. His testimony was accurate in so far as he was aware. Ms. Pitters, Assistant General Manager of Metro's Homes for the Aged Division, has a greater awareness of the reality, what is, as opposed to the theory, what could be, and her testimony is persuasive in this regard.

16. The testimony of Mr. Ball and Ms. Pitters, also reveals a true sense of the expanded career opportunities that would be available to the nurses if they were under the CUPE collective agreement. Both these witnesses testified that in their opinion the career opportunities of the nurses would be enhanced by having greater access to transfer and promotional opportunities. They asserted that the nurses would have job opportunities in Metro's other divisions that would not be available to them if they were outside the CUPE collective agreement. However, when questioned about specific instances of nurses from the CUPE bargaining unit taking advantage of these transfer and promotional opportunities they could not recall even one. The evidence of Ms. Pitters was that nurses, while applying to Metro's Homes for the Aged Division, are in fact hired to work in specific Homes.

17. A great deal of the majority decision is occupied with an analysis of the change in character to Carefree Lodge by reason of the expansion of beds and services that Metro intends to provide. With respect, I really do not see the relevance of this analysis. On an application under section 64 [previously section 63] an analysis of the changed character of the business is appropriate where the respondents position is that the change is of such significance that a sale of the business did not take place but merely a sale of assets. Then the Board must enter into the kind of inquiry the majority has here in order to determine if a sale of a business as contemplated by section 64 [previously s.63] did in fact take place.

18. That is not the case here. In this instance the parties are agreed that a sale of business did take place. The Board has so found. The only inquiry necessary is as to the job function of the members of the bargaining unit. While the majority have decided that the changes to Carefree have significantly altered the job function, I disagree. The members of the bargaining units in issue are still RN's and they are still working in a nursing capacity. They are still providing care-giving

services to the elderly. Some individuals will need specialized care but that doesn't go to issue of intermingling of the bargaining unit.

19. The majority, in particular at paragraphs 28 to 30, speak of the integration of Carefree with the other Homes in Metro's Homes for the Aged Division. This integration is at the administrative and managerial level only. The nature of the work performed is still care-giving by RN's. As mentioned above, far from being integrated, the RN's, with few if any exceptions, work in one specific home providing nursing care. The integration of the administration and management is irrelevant to the issue of intermingling of the bargaining units.

20. My comments on paragraph 42 are that it is fine for the employer and the Board to say these things but I didn't hear any nurses saying it. Unfortunately I do not read paragraph 44 as clearly as the majority would like. I do not see that CUPE's collective agreement clearly eliminates any of these problems. I believe the problems are still there. They would not be called a jurisdictional dispute they would be a work classification dispute. The only difference I see between the ONA and the CUPE unions is the fact that the resolution forum is different.

21. The "problems" enumerated in paragraph 45 can and should be dealt with at negotiations between parties. Scheduling would not be a problem if there were only one bargaining unit of nurses. Scheduling becomes a problem when the employer starts to recognize portions of two different collective agreements. At paragraph 46 the acknowledgement is made that the differences are largely explained by the "different historical context in which the ONA agreement was negotiated". This acknowledgement of reality makes all the commentary in the majority decision about the differences between the agreements superfluous. There is no reason that within the new context of bargaining with Metro ONA would not attain similar, or the same or even improved benefits over those contained in the CUPE agreement.

22. Paragraph 49 concludes with the sole and overriding argument of the employer for merging the bargaining units. Counsel for Metro said it would be an "administrative headache" for Metro to have to negotiate a separate agreement with a different bargaining agent. In cross-examination, however, Mr. Ball admitted that Metro employs some 40 individuals who as tradespeople are covered by province-wide trade collective agreements. In his evidence he said that there were four different collective agreements covering these 40 employees and he was not aware of any problems in the application or administration of these agreements by Metro.

23. In paragraph 69 the majority cite several decisions as precedence for favouring a large, all inclusive bargaining unit. There are two main criteria considered in these excerpts. The administrative convenience and efficiency for the employer and the problems inherent in having a multiplicity of bargaining units with the potential result of a multiplicity of work stoppages. This being not only economically inefficient but unfair to employees whose work is so integrated that they have to be laid off every time one of the bargaining units goes on strike. (See the majority decision, *Bestview Holdings*, at the bottom of page 30; *Ryerson Polytechnical*, para. 16 at page 31, and *Insurance Corporation of B.C.*, near the bottom of page 33).

24. In the case before this panel the nurses employed in the bargaining units at issue are covered by the *Hospital Labour Disputes Arbitration Act* and are not permitted to strike. The concern over work stoppages and their effects is largely moot. This leaves us with the "administrative headache" for the employer, in this case Metro. I do not believe that to negate the free selection of their own bargaining agent by the nurses at Carefree is an appropriate cure. The thrust of section 64 [previously section 63] is to preserve bargaining rights if at all reasonable.

25. In the result, the Board should issue an order preserving the existing collective agree-

ment and ONA's bargaining rights in respect of the nurses unit at Carefree. The CUPE bargaining unit definition/recognition clause to be amended accordingly.

0768-88-U National Elevator and Escalator Association, Complainant v. International Union of Elevator Constructors, International Union of Elevator Constructors, Local 50, International Union of Elevator Constructors, Local 90 and International Union of Elevator Constructors, Local 96, Respondents

Construction Industry - Duty to Bargain in Good Faith - Unfair Labour Practice - Whether union breaching the duty to bargain by insisting that there be one collective agreement and one seniority list for construction work and non-construction work in the elevator industry in the province, and by refusing Association's request that union sign the same non-ICI agreement it had signed with some individual employers - Whether subsequent collective agreement removing grounds for the complaint proceeding - Complaint dismissed

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. Patterson* and *R. W. Pirrie*.

APPEARANCES: *R. Ross Dunsmore*, *Andrew Reistetter* and *Tim P. Liznick* for the complainant; *B. Chercover*, *E. Shaw*, *T. McCann*, *W. Baxter* and *P. Verrege* for International Union of Elevator Constructors, International Union of Elevator Constructors, Local 50, International Union of Elevator Constructors, Local 90 and International Union of Elevator Constructors, Local 96.

DECISION OF THE BOARD; March 19, 1992

1. For reasons given below, the names of the respondents in the style of cause have been amended to International Union of Elevator Constructors, International Union of Elevator Constructors, Local 50, International Union of Elevator Constructors, Local 90 and International Union of Elevator Constructors, Local 96.

2. This complaint was brought originally on June 27, 1988 under section 91 [formerly section 89] of the *Labour Relations Act*. The union had begun a lawful strike on or about June 18th against all employers for whose employees the respondents held bargaining rights in the elevator industry in the Province of Ontario and who had been bound by the collective agreement between the complainant and the respondents which had expired April 30, 1988. It alleged that the respondents, together with J. Warner Baxter, Ernest Shaw, Thomas McCann, Peter Verrege, Joseph Kennedy, York Elevators Limited and Henry Render, Capital Elevators Limited and Ken Anderson, Televator Limited and Andy Johnson, Canadian Escalator and Elevator Service Company Limited and John Ainsworth, Classic Elevators and Jack Parks and J. Schindler Elevator Corporation, or any of them, had violated one or more of the multiple sections and subsections of the Act pleaded in the complaint. At a hearing on June 29, 1988, a different panel of the Board dismissed the complaint for want of prosecution insofar as it related to subsections 74(4), 133(1), 133(2), and 150(1) and section 152 [formerly subsections 72(4), 131(1), 131(2) and 148(1) and section 149(a)] of the Act. That panel of the Board also determined the complaint insofar as it related to subsections 148(1) and 148(2) [formerly subsections 146(1) and 146(2)] and adjourned the complaint respecting the alleged violations of sections 15, 70, 71 and subsection 154(1) [formerly sections 15, 69 and 70 and subsection 151(1)] of the Act. Hearings into the remaining allegations scheduled for Novem-

ber 21 and November 22, 1988, were adjourned on consent. The complainant filed an amended complaint on July 10, 1989 and requested that it be put on for hearing. Further amendments were filed on July 25, 1989. The remedies sought in the amended complaint included the following:

1. a declaration that it was unlawful of the respondents to insist on one collective agreement with the Association in the face of the Association's request to negotiate a separate agreement for non-ICI work;
2. a declaration that the respondent engaged in bad faith bargaining in negotiating non-ICI collective agreements with other companies in the elevator industry and by refusing to negotiate or even discuss such agreements with the Association;
3. an order that the respondent cease and desist from such unlawful activity referred to in items 1. and 2. and bargain in good faith during the next round of negotiations with the Association with a view to concluding two collective agreements, one for the ICI sector of the construction industry and one for the rest of the work performed by Association companies;
4. damages for loss of opportunity because of a prolonging of the strike as a result of the respondents' negotiation of unlawful collective agreements for work outside the non-ICI sector and subsequent refusal to bargain for a similar arrangement in that sector for members of the Association.

3. When hearings into the amended complaint began on August 30, 1989 before this panel of the Board, counsel for the complainant confirmed that the amended pleadings effectively reduced the complaint to an alleged breach of section 15 of the Act by the International Union of Elevator Constructors and its Locals 50, 90 and 96. The Board also heard and dismissed the motion of counsel for the respondents that the complaint be dismissed without hearing. The written reasons for the Board's decision are given in a decision which issued September 18, 1989. Evidence and argument respecting the merits of the complaint were heard on August 31, 1989 and January 10 and 11, 1990.

4. The conduct of the respondents which the complainant alleges constitutes a failure of the section 15 duty to bargain in good faith may be summarized as follows:

1. from the commencement of bargaining until the start of a legal strike on or about June 18, 1988, by refusing to consider or offer any alternate proposal to the complainant's proposal for either separate collective agreements for construction work and non-construction work, or separate seniority list for construction and non-construction employees, and by insisting there be one collective agreement and one seniority list for the elevator industry in the Province of Ontario; and,
2. after the start of the strike, by executing with each of several employers a collective agreement purporting not to apply to the industrial, commercial and institutional (ICI) sector of the construction industry, by attempting to negotiate a similar agreement with other employers, by refusing to consider the complainant's proposal to

enter into such an agreement with the Association and by continuing to insist there be one collective agreement for the construction industry.

5. The parties were able to agree on many of the facts and the Board heard the evidence of Andrew Reistetter for the complainant. Facts set out herein are based on the parties' agreement and the Board's conclusions of fact respecting the *viva voce* evidence. For ease of reference, the Board will refer to the National Elevator and Escalator Association either as "the Association" or "the complainant" and to the respondents collectively either as "the Union" or "the respondents" and to each respondent individually as "the International Union", "Local 50", "Local 90", and "Local 96".

6. The parties to this complaint share a lengthy bargaining history in the elevator industry. From approximately 1930 until 1972, bargaining in the elevator industry in Canada was national in scope, as reflected by a series of national collective agreements between employer associations which are the predecessors of the complainant and the International Union on behalf of its respondent Local Unions and other Canadian locals of the International Union. The last national collective agreement was replaced by a series of provincial agreements between the predecessors of the Association and the International Union after a national strike which took place in 1973. The last province-wide collective agreement in Ontario in effect between the Association and the International Union prior to the making of this complaint expired on April 30, 1988 ("the Agreement"). During the extensive bargaining history of the parties up to the expiry of the Agreement, the member employers of the Association and its predecessor employer associations were always subject to a single collective agreement for an all-employee bargaining unit covering all sectors of the construction industry and all non-construction aspects of the elevator industry for which the International Union or its locals had bargaining rights. In the circumstances, the history of bargaining between the parties to this complaint or their predecessors has been broader than that created by the province-wide bargaining scheme under the *Labour Relations Act*.

7. The 1973 strike in Ontario was ended by Provincial legislation which imposed compulsory arbitration on the parties. That arbitration produced a first provincial agreement in the elevator industry in Ontario. The parties usually refer to that agreement as the Anderson award. That award issued February 28, 1974. One of the products of the award was a unique seniority provision which has continued in each provincial collective agreement from 1974 to the present. Effective 1978, that provision provided industry-wide seniority protection to employees after six months service with a single employer. The employers had opposed seniority protection to long service employees during the Anderson interest arbitration and subsequently have proposed that the industry-wide seniority provisions be removed from the provincial collective agreement in order to provide employers with greater flexibility in their control of manpower. During the 1982, 1984 and 1986 bargaining sessions, the Association proposed the elimination of seniority and the creation of two collective agreements, one covering construction work and the other covering non-construction maintenance and service work. The International Union has consistently taken the position that the industry-wide seniority protection has provided job security for its members which it would be inappropriate to abandon. Accordingly, the International Union has consistently resisted any change in the job security provisions by way of amendment to the seniority provisions or by way of negotiating separate collective agreements for construction and non-construction work.

8. The *Labour Relations Act* was amended in 1977 to create a province-wide bargaining scheme in the ICI sector of the construction industry in Ontario. The Association became the designated employer bargaining agency in that sector for all employers for whose employees the International Union or any of Locals 50, 90 and 96 held bargaining rights in that sector. The Interna-

tional Union became the designated employee bargaining agent in the ICI sector for those three locals. In 1978 and every two years thereafter, the parties continued to bargain a single provincial collective agreement for an all-employee unit. This agreement applied to all employers in the ICI sector for whose employees the International Union or any of its three Locals held bargaining rights in that sector, whether or not the employers were members of the Association. The agreement continued to apply also to all of the Association's members for all work in other sectors of the construction industry and in non-construction maintenance and service work in the elevator industry. Outside of the ICI sector, employers in the elevator industry who are not members of the complainant and who are bound to the provincial collective agreement as it relates to the ICI sector of the construction industry have acceded to the agreement in other sectors of the construction industry and in non-construction maintenance and service work in the elevator industry and have followed its terms and provisions as their own. From time to time, some of those employers have negotiated separate agreements when no provincial collective has been in place. The International Union has always insisted that, when a provincial agreement was in place, the terms of that agreement would supersede those of any other agreement which had been negotiated with individual employers.

9. In the 1982, 1984, and 1986 bargaining sessions, when the complainant proposed that there be two collective agreements and that seniority be eliminated, the seniority proposal was a fall-back position should the proposal for two collective agreements not succeed. The reason which the complainant gave in bargaining for its proposals was that the skills required for maintenance and service work were different than those required for construction. Since most of the senior employees were in construction, whenever they exercised their seniority to bump into maintenance and service work, it disrupted that aspect of the employer's business. The reason which the Union gave for opposing either change was that a single collective agreement and seniority provisions which applied across the elevator industry were essential for the protection of older and longer service employees. During those three bargaining terms, the parties engaged in what Andrew Reistetter, the spokesman for the Association, referred to in cross-examination as a "fair number of discussions".

10. The 1988 proposals from the Association included a proposal for two separate collective agreements. One for construction and one for all other work in the elevator industry and a proposal to amend seniority, but without proposing specific seniority language. Of the two proposals, the Association's primary objective was to have two separate collective agreements. Seniority was a fall-back position. When bargaining began in mid-April, the Union's reaction to a proposal for two separate collective agreements was "not again". Reistetter was not surprised by the reaction. From the start of bargaining, the Union's position was that two separate collective agreements was not a bargaining objective which the Association was going to achieve. Several times in bargaining the Union's response to the Association's arguments for the proposal was to the effect that two collective agreements were not beneficial to the union. The Association realized fairly early in bargaining that its objective of getting two collective agreements was not available and it switched its attention to seniority. While the parties discussed seniority during direct bargaining, the Association did not propose any specific seniority language.

11. The bargaining moved to conciliation in May after three or four direct bargaining meetings between the parties. The Association discussed with the conciliation officer its underlying rationale for requiring two collective agreements and for changes to the seniority provisions if it was unable to obtain two collective agreements. It is not clear on the evidence whether there was direct discussion of the Association's proposal for two collective agreements, but there was discussion of seniority. Reistetter estimates that the parties spent from four to five hours overall discussing the two issues in direct bargaining and in conciliation. The Association did not propose any

seniority language during the conciliation process. The parties were in mediation for three days in June prior to the strike beginning on June 18th. The Association did not raise the two collective agreements issue at mediation. Seniority was discussed with the two mediation officers but was there was no direct discussion with the Union. The Association did make written proposals to amend the seniority provisions so as to limit bumping into maintenance and service work by mechanics employed in construction. The Union rejected the proposal, but some compromise was reached on seniority which would make training in maintenance available to mechanics working in construction and limit their opportunities to bump into maintenance if they did not avail themselves of training in maintenance.

12. The Association reintroduced the issue of two collective agreements during the strike after some of the local unions had executed collective agreements with some of the individual employers who were not members of the Association. These agreements did not relate to the ICI sector of the construction industry. They came about after York Elevators Limited informed the Union that the Association did not bargain for York outside of the ICI sector of the construction industry. When the Union took a contrary position, York filed a complaint under the Act alleging that the Union was engaged in an unlawful strike against York. The complaint was settled when the Union negotiated a collective agreement with York. The Union then negotiated collective agreements containing the same terms with a few other independent employers, including J. Schindler Elevator Corporation. All of these agreements contained a provision which purported to modify them to be consistent with the terms of the "...usual Provincial agreement..." once it is settled. Upon learning of Schindler's agreement, on June 27 Reistetter told J. Warner Baxter, the senior executive officer of the International Union in Canada, that the Association was prepared to bargain a collective agreement similar to the ones which they had negotiated with York and Schindler. Baxter's response after a couple of minutes discussion was that there would be one collective agreement for the elevator industry in Ontario. On July 11, the Association requested the Union to resume formal negotiations for the purpose of bargaining a collective agreement excluding the ICI sector similar to the one executed with Schindler. The Union replied that it was prepared to resume bargaining for the renewal of the Ontario Provincial Agreement.

13. Bargaining did resume, although the evidence does not reveal when that happened or how many meetings the parties held. Four issues remained to be resolved, including the issues of seniority and two collective agreements. The other two issues were also Association proposals. One dealt with the installation of factory assembled escalators and the other was to substitute increased contributions to the pension and welfare plans for a thirty-three and one-third cent increase resulting from an award of an interest arbitrator which was awaiting judicial review. With respect to the two collective agreements, the Association had made an amended proposal for one collective agreement applying to the ICI sector of the construction industry and another applying to the rest of the elevator industry. The Union's position on that issue was that a single collective agreement was essential for the protection of its members. The Association's position was that the party should attempt to negotiate language which would alleviate the union's concerns. The proposals respecting factory assembled escalators and the substitute for the arbitration award were eventually withdrawn and the parties executed a memorandum of agreement on July 27th to renew the expired collective agreement, amended in accordance with the terms of the memorandum of agreement. The terms of the memorandum included a new seniority provision making courses in maintenance available to elevator mechanics working in construction and limiting the bumping protection of such mechanics if they do not avail themselves of the courses. The memorandum also contains the parties' acknowledgement that its terms constitute full settlement of all matters in dispute.

14. The memorandum of agreement had been subsumed into a formal collective agreement

by the time the complainant filed its amendments to the complaint. Clause 20.02 of the collective agreement provides as follows:

“20.02 This Agreement defines the entire relationship between the parties for the term of this Agreement and, except as herein specifically provided for, neither party shall during the term of this Agreement, have any obligation to bargain with respect to any matter not covered by this Agreement nor concerning any change or addition thereto.”

The Argument

15. The argument of the Association counsel runs as follows. He submits that the bargaining conduct of the Union has to be measured against three sets of responsibility:

1. the responsibility of the Union and the Association, under section 15 of the Act, to engage in full and complete discussion of the issues in an attempt to achieve a collective agreement;
2. responsibility of the Association and the International Union as designated bargaining agencies in the province-wide bargaining scheme to achieve a collective agreement relating to the ICI sector of the construction industry; and,
3. the responsibility of the Union and the Association, as bargaining agents for its members, to achieve a collective agreement for the elevator industry, excluding the ICI sector of the construction industry.

Against those responsibilities, counsel submits that the Union has failed to bargain in good faith and make every reasonable effort to make a collective agreement as required by section 15 of the Act, because it;

1. pressed to impasse the continued integration in a single collective agreement of the terms and conditions of employment for the ICI sector of the construction industry and the rest of the elevator industry; and,
2. refused to discuss with the Association the collective agreements for the elevator industry, excluding the ICI sector of the construction industry, which were negotiated with some individual employers who were not members of the Association.

16. Counsel for the Association argues that it is inconsistent with the scheme of the Act for the Union to press to impasse the requirement for a single collective agreement covering the entire elevator industry, including the ICI sector of the construction industry, in circumstances where the Association is unwilling to bargain a single, comprehensive collective agreement for the elevator industry. According to counsel, the province-wide bargaining provisions of the Act have superimposed on the general duty of designated bargaining agencies to bargain in good faith, the specific duty “...to bargain in good faith and make every reasonable effort to make a ...” provincial agreement as defined in section 139 [formerly section 137] of the Act. For the International Union, that duty applies in respect of all employees for whom the International Union or Locals 50, 90 and 96 have bargaining rights in the ICI sector of the construction industry. For the Association, it applies to all employers of those employees, whether or not they are members of the Association. In turn, section 148 [formerly section 146] of the Act requires that the International Union and the Association bargain only one provincial agreement for those employees and employers; makes it unlawful

for them or any person, employee, trade union, council of trade unions, affiliated bargaining agent, employer, employer's organization, group of employers' organizations to bargain for, attempt to bargain for or conclude any collective agreement or other arrangement affecting employees represented by the Union in the ICI sector; and makes any other agreement or arrangement null and void.

17. In addition to their specific duty "...to bargain in good faith and make every reasonable effort to make a ..." provincial agreement, the International Union and the Association also have the general section 15 duty to bargain in good faith towards a collective agreement for the elevator industry in Ontario, excluding the ICI sector. For the Union, that involves bargaining on behalf of all employees of employers in the elevator industry for whom it has bargaining rights. These are the employees of the employers listed on Schedule "C" of the Agreement. For the Association, that involves bargaining with the International Union on behalf of its members for whose employees the Union holds bargaining rights in the elevator industry. They too are listed on Schedule "C". The Association has no duty to bargain a collective agreement for the elevator industry, excluding the ICI sector of the construction industry, for the employers on Schedule "C" who are not its members. While they are bound by operation of statute to the provincial agreement for the ICI sector negotiated between the International Union and the Association, historically they have been bound to the province-wide agreement between the Union and the Association for non-ICI construction and non-construction maintenance and service work by having acceded voluntarily to the agreement.

18. Therefore, in these circumstances and for several reasons, counsel submits that the Union's insistence on bargaining a single, comprehensive collective agreement for the elevator industry in Ontario is inconsistent with the province-wide bargaining scheme and contrary to the Union's specific duty to bargain in good faith towards a provincial agreement for the ICI sector of the construction industry and its general duty to bargain in good faith towards a collective agreement for the other sectors of the construction industry and for non-construction maintenance and service work.

19. First, by insisting on one province-wide collective agreement for the elevator industry in Ontario, the Union is trying to force on the Association, its member employers and independent employers who are opposed to continuing with a single, comprehensive collective agreement, a bargaining process in which they have participated voluntarily in the past. Both groups of employers accepted one collective agreement as governing their labour relations throughout the elevator industry. That was achieved voluntarily by the Association bargaining the collective agreement on behalf of its members and the independent employers acceding to it. After introduction of the province-wide bargaining scheme in 1978, they were bound by statute to the agreement respecting the ICI sector of the construction industry in Ontario, but continued to accede to it for the rest of the elevator industry. Throughout past bargaining the parties have recognized a bargaining duty to achieve a single, comprehensive collective agreement. York decided to get out of that voluntary arrangement respecting the non-ICI work, and the Union tried to force York to remain in. Eventually the Union signed separate collective agreements with York, Schindler and others which another panel of the Board found did not apply in the ICI sector. That was a complete about-face from the position which the Union had taken right into the strike and the catalyst which caused the Association to seek similar treatment for its members. The Union refused the Association's request to return to the bargaining table to negotiate with it for the same kind of agreement and continued to insist on a single, province-wide agreement for the elevator industry. Since there is no legal basis for the Union to compel the Association to negotiate for its members a single collective agreement for the elevator industry which would include terms and conditions of employment for the ICI sector of the construction industry together with those for non-ICI and non-construction

work, by continuing to insist on such an agreement when the Association was opposed to it, the Union was failing to make every reasonable effort to end the strike and conclude a collective agreement. Similarly, since there is no legal basis for the Union to compel all employers on Schedule "C" of the Agreement to bargain together for a single collective agreement, by pursuing that position to a strike, the Union failed to make every reasonable effort to achieve a provincial agreement for the ICI sector of the construction industry and a collective agreement for the elevator industry in Ontario, excluding the ICI sector. In that respect, counsel relies on *Burns Meats Ltd.*, [1984] OLRB Rep. Aug. 1049 for the proposition that it is a breach of the section 15 duty to bargain in good faith to bargain for a collective agreement which has no foundation in the Act.

20. Second, the province-wide bargaining part of the Act requires the International Union and the Association, as designated bargaining agencies, to bargain in good faith towards a collective agreement for the ICI sector of the construction industry. The International Union, by requiring that the Association bargain for a single, comprehensive collective agreement for the elevator industry is requiring that bargaining the terms and conditions of employment for the ICI sector of the construction industry be combined with bargaining the terms and conditions of employment for the rest of the elevator industry. In so doing, the Union is forcing employers to bargain about matters which cannot be taken to impasse in bargaining for a provincial agreement in the ICI sector of the construction industry. Therefore, when bargaining for a single collective agreement is taken to impasse over matters which are outside of the ICI sector, it is inconsistent with the province-wide bargaining scheme and contrary to the section 15 duty to bargain. For the same reason, counsel argues, it was a breach of the section 15 bargaining duty to bargain to impasse in the non-ICI part of the elevator industry over matters in the ICI sector of the construction industry. It is also inconsistent with the Association's specific duty to bargain a provincial agreement for the ICI sector of the construction industry to be required to tie together its bargaining responsibilities in the ICI sector and its bargaining responsibilities outside of that sector by the Union's insistence on bargaining one collective agreement covering the ICI sector and other sectors. This is because section 148 contemplates that those employers for whom the Association's bargaining rights are restricted to the ICI sector, will be able to look to the collective agreement which is the product of the bargaining and know what are their obligations in that sector. A single collective agreement which includes the terms and conditions of employment for the entire elevator industry frustrates that objective. Furthermore, the Union's section 15 duty obligated it to focus on effective ways to resolve the strike. The Union failed in that duty by continuing through its insistence that bargaining about the terms and conditions of employment for the ICI sector of the construction industry and non-ICI elevator industry work be integrated when the Association was unwilling to do so and was seeking to negotiate a separate collective agreement for the non-ICI part of the elevator industry.

21. Third, by taking the single agreement issue to a strike, and by continuing to hold that position during the strike in face of the Association's request to negotiate a separate collective agreement for the non-ICI part of the elevator industry in Ontario similar to those which the Union signed with independent employers like York and Schindler, the Union was attempting to force the Association to bargain the terms and conditions of employment in the non-ICI part of the industry for other independent employers for whom the Association had no bargaining rights. Thus the Union was seeking to extend the Association's bargaining rights by pressing to impasse its position that there be a single collective agreement for the elevator industry in Ontario. Since a strike for recognition is conduct inconsistent with the scheme of the Act, the Union was failing to bargain in good faith by pressing its one-agreement position to a strike. In that respect, counsel relies on the decision of the Board in *United Brotherhood of Carpenters & Joiners of America*, [1978] OLRB Rep. Aug. 776.

22. With respect to the Association's claim that the Union breached its section 15 duty

when it refused to discuss with the Association the collective agreements for the elevator industry, excluding the ICI sector of the construction industry, which the Union negotiated with individual employers who were not members of the Association, the thrust of Association counsel's argument is that the negotiations of those agreements represented a complete about face in the position which the Union had taken in bargaining right up to the start of the strike. Having departed from its insistence on a single, comprehensive collective agreement for the elevator industry, the Union had no right to refuse to discuss with the Association a similar agreement for its members. By continuing to insist on a single collective agreement with the Association for the elevator industry, the Union deprived the Association of any significant discussion of the issue of a separate collective agreement for the non-ICI part of the industry. The Union's section 15 duty required that it at least discuss providing the Association members with a similar opportunity to carry on work outside of the ICI sector of the construction industry.

23. Counsel for the Union began his argument by reminding the Board of his submissions made in support of the motion to dismiss the complaint without a hearing. Since the Board dismissed the motion because it "...could not say with certainty that the complainant was not entitled to the relief which it was seeking without the Board having the benefit of the evidence and full legal arguments of the parties.", counsel asked the Board to consider that argument in light of the evidence now before it. Counsel's primary position was that the memorandum of agreement which was executed July 27, 1988 created a new provincial agreement to run from that date until April 30, 1990. Accordingly, there was no present obligation on the Union to bargain with the Association and, therefore, there could be no failure to bargain in good faith on the part of the Union and the complaint should have been dismissed. In the alternative, to the extent that the amended complaint contains the claim that the Association signed the memorandum of agreement without prejudice to its right to bring forward the complaint, there is no foundation to the claim. On the contrary, counsel submits, the memorandum of agreement contained a provision which stated as follows:

"The parties agree herein to the terms of this memorandum as constituting full settlement of all matters in dispute."

Since the complaint was a matter in dispute between the parties at the time the memorandum of agreement was made, it was one of the matters settled by the parties' execution of the memorandum of agreement on July 27th. Therefore, in either event, there is no basis on which the complainant can establish its entitlement to any of the remedies sought in the complaint.

24. With respect to the complainant's argument that, when the Union pressed to impasse the requirement of a single collective agreement for the elevator industry in the province of Ontario, it was attempting to extend the complainant's bargaining rights in the non-ICI sector part of the industry to include individual employers who are not members of the Association and for whom the Association did not have bargaining rights outside of the ICI sector of the construction industry, Union counsel argues that the bargaining parties are the International Union and the Association and, as between them, the collective agreement is binding in the elevator industry in the province of Ontario on the International Union, its Ontario locals, the Association, its members and their employees for whom the Union has bargaining rights in the elevator industry. It is binding also in the ICI sector of the construction industry in the province of Ontario on employers who are not members of the Association and for whose employees the Union has bargaining rights in the ICI sector, and on those employees. All that the Union was doing in pressing the single collective agreement issue to impasse was seeking to preserve the integrity of those bargaining rights. It was not an attempt to extend the complainant's bargaining rights outside of the ICI sector so as to include employers who were not its members. Similarly, to bargain to impasse the issue of a sin-

gle collective agreement is to insist on the preservation of an established, single bargaining unit, it is not taking to impasse an attempt to create new bargaining rights by voluntary recognition.

25. Nor was it a breach of the province-wide bargaining scheme of the Act to press to impasse the issue of a single, province-wide collective agreement for the elevator industry which would include the ICI sector of the construction industry in the province of Ontario, counsel submits. The amendments to the Act which introduced province-wide bargaining in the ICI sector of the construction industry did not add to or alter the scope of bargaining rights which existed at the time. While the amendments did give the International Union and the Association the exclusive authority to conduct bargaining and conclude a provincial agreement as defined by section 139 of the Act, as long as they bargain within the scope of their bargaining rights, nothing in the Act prohibits them from bargaining for and concluding a collective agreement which is more than a provincial agreement as defined in section 139 and which includes sectors of the construction industry other than the ICI sector and non-construction service and maintenance work. Counsel argues further that the Board recognized that reality in *London Sandblasting & Painting Limited* [1982] OLRB Rep. Sept. 1322, particularly at paragraphs 16, 18 and 19. Therefore, since the Act does not prohibit designated bargaining agencies from concluding a collective agreement which includes terms and conditions of employment which relate to the ICI sector of the construction industry along with terms and conditions of employment which relate to other sectors and to non-construction work, it was not inconsistent with the province-wide bargaining scheme for the ICI sector of the construction industry, or with the Act, to press to impasse the issue of a single, comprehensive, province-wide collective agreement for the elevator industry. Accordingly, counsel argues, it was not a breach of its section 15 duty for it to do so.

26. Union counsel denies that the Union refused to discuss the Association's request that the Union negotiate a separate collective agreement for the elevator industry, excluding the ICI sector of the construction industry, like those executed with individual employers. Counsel submits that, prior to the strike, the Association had dropped its proposal for separate collective agreements for construction and for non-construction service and maintenance work, and focused on its seniority proposal for the same relief which it was seeking with its proposal for two collective agreements. The complainant's renewed demand for two collective agreements in the form of one for the ICI sector and the other for the rest of the elevator industry was clearly triggered by the collective agreement which the Union negotiated with individual employers covering the elevator industry, exclusive of the ICI sector of the construction industry. Those collective agreements were negotiated when York took the position that the Association had no authority to bargain for it outside of the ICI sector and filed a complaint alleging that the Union was engaging in an unlawful strike against York in the elevator industry outside of the ICI sector. York and the Union settled the complaint by signing a collective agreement for the elevator industry, excluding the ICI sector. The Union then proceeded to sign similar collective agreements with several other employers who were not members of the Association, including Schindler. That was when the Association renewed its proposals for two collective agreements by requesting to negotiate with the International Union for a collective agreement, excluding the ICI sector of the construction industry, similar to the one signed with each of York and Schindler. When the International Union responded that it was prepared to return to the bargaining table to negotiate a renewal of the province-wide collective agreement for the elevator industry, it was not refusing to bargain with the Association with respect to terms and conditions for the non-ICI part of the industry because, by bargaining for the entire elevator industry, the parties would be bargaining terms and conditions of employment for the non-ICI sectors of the construction industry as well as for the non-construction service and maintenance part of the elevator industry. For the Union to have agreed to bargain the way the Association was asking, would have been to allow the Association's members to preserve their work in the remainder of the elevator industry at the expense of ICI bargaining. Counsel submits

that the section 15 duty does not require the International Union to divide its bargaining in the manner sought by the Association and by so doing, weaken its bargaining position.

27. Union counsel argues further that section 15 serves two purposes. First, to reinforce the obligation of each bargaining party to recognize and deal with the existing bargaining agency opposite it. Second, to assure there will be rational communications about the matters which are the subject of the negotiations.

28. With respect to the first purpose, the effect of agreeing to a separate collective agreement for the elevator industry, excluding the ICI sector of the construction industry, would be to divide the single, province-wide bargaining unit for the elevator industry into two units and, in so doing, would weaken the Union's bargaining rights for employees of the Association members. It is not a failure of the Union's duty to bargain in good faith to take to impasse the Association's post-strike proposal for two separate collective agreements (thus, for two separate bargaining units) in order to protect and continue the Union's existing, province-wide bargaining rights for employees of the Association's members.

29. With respect to the second purpose of section 15, the bargaining history of the parties since the Anderson award in 1973 shows that the Association has consistently proposed dividing the Union's bargaining rights into two units, construction and non-construction, or, in the alternative, separating seniority into two such groups. The Union has responded just as consistently that neither two collective agreements nor two seniority lists is in the interest of the Union or its members, and that a single collective agreement with a common seniority list for construction and non-construction is essential for the protection of its members with long service in the elevator industry. The Union disagreed with the Association's claim that the difference in the skill requirements for mechanics doing service and maintenance work made it essential to eliminate bumping from construction into that kind of work. It also disagreed with the Association's position that the "skill and ability" requirement of the bumping provisions was ineffective protection for the skill requirements in service and maintenance work. Those were the positions taken by the Union in prior bargaining years and in 1988.

30. One effect of the Association's post-strike proposal to negotiate a separate collective agreement for its members covering the elevator industry, excluding the ICI sector of the construction industry, was to put the parties back into the same position that they were in prior to the strike respecting the two collective agreements issue. Bearing in mind the positions taken by the Union in prior bargaining years and at the start of the 1988 bargaining and the discussion attendant thereon, as little as two or three minutes discussion before rejecting the Association's proposal was still rational discussion within the context of a mature bargaining relationship and the history of bargaining about whether there will be a single, province-wide collective agreement for the elevator industry. In that respect, counsel submits that it is clear from Reistetter's acknowledgement in cross-examination that he and the Association knew why the Union was not prepared to agree to negotiate a separate collective agreement for the non-ICI part of the elevator industry. Furthermore, counsel submits that signing collective agreements with individual employers for the elevator industry, excluding the ICI sector of the construction industry, was not a departure from the Union's position that there be only one province-wide collective agreement for the elevator industry because it was an expressed term of those collective agreements that they be subsumed by the province-wide collective agreement when it was renewed.

31. Therefore, counsel submits, both purposes of section 15 have been satisfied and, while the Union's position in pressing to impasse the two collective agreements issue, and retaining that

position during the strike when the Association reintroduced the issue in a different form, may have been hard bargaining, there has been no breach of section 15 of the Act.

32. Association counsel argued as follows in rebuttal. With respect to the Union's argument that there was no present duty on it to bargain with the Association once the memorandum of agreement was executed because no issues remained, counsel argued that there were outstanding issues because this complaint and the judicial review of the interest award respecting the thirty-three and one-third cents per hour wage increase were still outstanding. With respect to Union counsel's argument that the Board in *London Sandblasting, supra*, has found lawful the same kind of comprehensive collective agreement which the Union and Association have bargained in the past, the Association's position is that, even though the Act may not prohibit such agreements when negotiated voluntarily, it places no obligation on the Association to negotiate one overall collective agreement for the elevator industry in Ontario, and more particularly, the province-wide bargaining part of the Act does obligate the International Union and the Association to bargain a provincial agreement for the ICI sector of the construction industry. Finally, with respect to the duty to bargain in good faith requiring rational discussion, counsel argues that the Union's signing of separate collective agreements with individual employers was a dramatic change from its earlier insistence on a single collective agreement. That new circumstance created a need, when bargaining resumed, for rational discussion with the Association about the consequences for the elevator industry of those collective agreements. The Union's refusal to discuss the Association's proposal for a collective agreement for the non-ICI part of the elevator industry was a failure to engage in that rational discussion and a breach of its section 15 duty to bargain in good faith. That breach prolonged the strike.

The Decision

33. It is appropriate that the Board deal first with the argument which Union counsel originally made in support of his motion that the complaint be dismissed without a hearing. The Board agrees with Union counsel that the section 15 duty to "...bargain in good faith and make every reasonable effort to make a collective agreement" ends with the making of a collective agreement, and that there is no duty to bargain in good faith respecting matters arising during the term of a collective agreement. However, that is not reason for the Board to dismiss the complaint now. This is because the complaint was made while both parties were subject to the duty to bargain in good faith, and the remedies sought are not limited to bargaining orders pertaining only to the bargaining which preceded the execution of the memorandum of agreement. While the amended complaint was filed nearly one year after the parties' bargaining duty had ended, the primary effect of the amendments was to delete from the complaint the alleged breaches of other sections of the Act. It did not alter the material facts alleged in support of the claimed breach of section 15, all of which dealt with alleged conduct prior to the execution of the memorandum of agreement. The range of remedies sought includes damages for loss of opportunity alleged to have resulted from a prolonging of the strike because of the Union's breach of its section 15 duty, and a bargaining order respecting the anticipated bargaining when the open period of the newly executed collective agreement is reached. Moreover, even though the bargaining duty ends with the making of a collective agreement, that has not prevented the Board from entertaining a complaint made after the agreement and inquiring into a party's conduct prior to the making of the agreement, because of some event subsequent to the agreement, where that event is alleged to disclose a breach of the bargaining duty. An example is to be found in *Kennedy Lodge Nursing Home*, [1980] OLRB Rep. Oct. 1454, one of the authorities relied on by Union counsel, and in *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, referred to therein.

34. Therefore, in the circumstances of the complaint, the fact that the parties' bargaining

duty had come to an end and they were under no statutory duty to bargain, is not reason to dismiss the complaint. That is not to say, however, that the Board would have come to the same conclusion if the only remedy sought was the prospective bargaining order. While it may be possible to have breaches of the bargaining duty the nature of which might cause the Board to make a prospective bargaining order, this is not such a case even were the Board to find that the Union had breached section 15 of the Act.

35. With respect to Union counsel's argument that the signing of the memorandum of agreement cured any breaches of the section 15 duty to bargain in good faith which might have existed prior to the agreement, the fact that the memorandum became a collective agreement is not in contention. Whether that event cured the alleged breaches of section 15 is in contention. Union counsel submits that *Kennedy Lodge*, *supra*, and *Fotomat Canada Limited*, [1982] OLRB Rep. July 1020 are authorities for the proposition that the agreement did cure the alleged breaches. In *Kennedy Lodge*, the Board had to decide an issue of whether the section 15 duty extended beyond the making of a collective agreement, in the form of a ratified memorandum of settlement, to the signing of the formal collective agreement. The Board dealt with the issue succinctly at paragraph 17:

The question raised is whether the [section 15] obligations were extended during the period of August 21st [the ratification of the memorandum] to December 16th [the date of signing of the formal collective agreement]. The evidence in the instant case clearly establishes that, as of August 21, 1979 a collective agreement had been brought into existence by the parties. The obligations of [section 15] which are directed to the conduct of the parties in their efforts to reach a collective agreement are no longer applicable since an agreement is concluded. A similar issue was raised, in a somewhat different manner, in the case of *Inglis Limited*, [1977] OLRB Rep. Mar. 128. The Board there stated at paragraph 15,

'Counsel for the respondent argued that the duty set out in [Section 15] of the Act is a continuing duty requiring the employer to negotiate the terms of a mid-contract relocation with the union. The Board rejects this argument. The duty stipulated in [Section 15] is in respect of the duty to bargain for a collective agreement. ...'

• • •

In *Fotomat*, *supra*, the Board had found the employer liable in damages for breaches of section 15 prior to the making of a collective agreement. The parties could not agree on the parameters for calculating the amount of damages and the Board had to decide "...the period of entitlement over which monetary losses ... should be calculated" (paragraph 4). In the process of deciding that question, the Board stated in part as follows at paragraph 9:

However, we do need to decide from what point in time recoverable losses run from and precisely what losses during the relevant period ought to be recovered. The easiest point in time to determine is the point in time to which bargaining losses run. All bargaining losses can be considered as running to December 3, 1980. On that date the parties entered into a binding memorandum of agreement...

36. Neither of those decisions are wholly on point with the facts of this complaint, a fact recognized by Union counsel in his submissions, and are of limited assistance to the Board in this complaint. In *Kennedy Lodge*, the Board decided a question of whether the bargaining duty ended with the making of a *de facto* collective agreement or with the signing of the formal document in order to determine whether the employer had a duty to bargain about plans or intentions to contract out some bargaining unit work, which plans came into existence between those two points in time. In *Fotomat*, there had been an earlier Board finding that the employer had breached its section 15 bargaining duty prior to the making of the collective agreement. In determining for the parties certain parameters for measuring damages arising out of the breach, the Board found that the

employer's liability ended with the making of the collective agreement. The question in the instant complaint is whether, once the collective agreement was made, any grounds remained for finding that, prior to the making of the collective agreement, the Union had breached its duty to bargain in good faith and make every reasonable effort to make a collective agreement.

37. The Union's conduct described in the two items at paragraph 4 above is what Association counsel argues constitutes the failure to bargain in good faith and make every reasonable effort to make a collective agreement. The first relates to the Union's bargaining conduct around the issue of whether there would continue to be one collective agreement in the elevator industry in Ontario or, as proposed by the Association, either separate collective agreements or separate seniority lists for construction and non-construction work. The second relates to its bargaining conduct respecting the Association's request, after the start of the lawful strike, to negotiate the same collective agreement for the elevator industry, excluding the ICI sector of the construction industry, which the Union had negotiated with some individual employers for whom the Association had no authority to bargain outside of the ICI sector of the construction industry.

38. The Association dropped its proposal for separate collective agreements in construction and non-construction work before the strike started and concentrated on the issue of having separate seniority for those two parts of the elevator industry. The "two agreements" issue arose again approximately one week into the strike, but this time in the form of a request from the Association that the Union sign the same non-ICI collective agreement as it had signed with some individual employers. When the parties resumed bargaining, the matters in dispute included the related issues of separate seniority and the non-ICI collective agreement along with two other issues. When bargaining ended, the Union and the Association had made a single collective agreement with common seniority for the elevator industry in the Province of Ontario. The seniority provisions, however, did include a new condition aimed at providing employers with some protection when employees transfer into non-construction service and maintenance work on lay-off from construction work.

39. The parties knew what issues remained to be bargained when they went back to the bargaining table. The bargain which they made settled those issues, including the related issues of whether there would be separate seniority for construction and non-construction work and a separate collective agreement between the Union and the Association for the non-ICI part of the elevator industry. Their agreement that the memorandum of settlement constitutes full settlement of all matters in dispute clearly disposes of all of the issues about which they had bargained. That agreement does not dispose of this complaint, however, because there is no evidence that it was a bargaining issue with the parties.

40. Nonetheless, in the Board's view, their bargain has removed the grounds for the complaint proceeding. Clearly no bargaining remedy is required to help the parties conclude a collective agreement and a declaration of breach of section 15 would serve no useful purpose in that respect. There is no evidence that the strike was prolonged by the Union negotiating collective agreements with individual employers, therefore, there is no basis for the claim of relief for the Association's members in the form of damages for the loss of business opportunity from a prolonging of the strike. Finally, as the Board observed earlier in the decision, this is not a case where the Board would make a bargaining order about the next round of bargaining. Even were the Board to assume, without finding, that it was inconsistent with the province-wide bargaining scheme of the Act for a designated bargaining agency to bargain to impasse over issues outside of the ICI sector of the construction industry while bargaining to attempt to conclude a provincial agreement for the ICI sector, the Board would not make a prospective bargaining order prohibiting the intermingling of ICI and non-ICI proposals and bargaining. If for no other reason, it would be an intrusion in the

subject matter of bargaining unwarranted by the circumstances of this complaint. The Board in *United Brotherhood of Carpenters, supra*, makes it clear that it is not a breach of the bargaining duty to bargain about matters which might be inconsistent with the scheme of the Act, as long as bargaining on such matters is not taken to impasse. The Board would also be prejudging the parties' bargaining proposals and conduct by making such an order. Thus, to put it another way, in the circumstances of this complaint, even if the Union had been in breach of its section 15 duty to bargain for an agreement for the non-ICI part of the elevator industry or separate seniority lists, the making of the collective agreement has cured the breach.

41. Therefore, now that the Board has heard the evidence and submissions of the parties, it can say with certainty that the complainant is not entitled to the relief which it is seeking. In the result, the complaint is dismissed.

42. In the alternative, should the Board be wrong in that conclusion, on the facts of this complaint, the Board would find that the Union has not breached its duty to bargain in good faith and make every reasonable effort to make a collective agreement.

43. The claim that the Union had breached its section 15 duty to bargain in good faith by pressing to impasse its position that there be one province-wide collective agreement for the elevator industry in Ontario and by continuing during the course of the strike to insist on one such collective agreement was a central element of the Association's allegations and submissions. The crux of Association counsel's argument was that the province-wide bargaining provisions of the Act requires designated bargaining agencies to bargain for the ICI sector of the construction industry a provincial agreement as defined in section 139 of the Act. Therefore, where either an employee or employer bargaining agency is unwilling to bargain a broader collective agreement encompassing a provincial agreement, it is inconsistent with the province-wide bargaining scheme of the Act for the other one to carry to a strike or lockout a demand for a comprehensive agreement covering more than the ICI sector. In the same way, counsel submits, the requirement to bargain a provincial agreement for the ICI sector, makes it inconsistent with the province-wide bargaining provisions and a breach of the section 15 duty to bargain to impasse over a requirement that terms and conditions of employment for the ICI sector of the construction industry and for the other sectors and non-construction service and maintenance work be bargained together.

44. There is no doubt that section 15 imposes a duty on designated bargaining agencies to bargain in good faith towards making a provincial agreement for the ICI sector of the construction industry and subsection 148(2) prohibits them from bargaining for or concluding any other collective agreement or arrangement for that sector. Where, however, the designated bargaining agencies have bargaining rights beyond the ICI sector of the construction industry, there is nothing in the province-wide bargaining provisions which requires them to bargain a collective agreement which is exclusively a provincial agreement as defined in section 139 of the Act, or which prohibits them from bargaining a broader collective agreement which is consistent with the scope of their respective bargaining rights and encompasses a provincial agreement. That was recognized by the Board in *London Sandblasting, supra*, and is consistent with the fact that the introduction of province-wide bargaining was not intended to alter existing bargaining rights. In *London Sandblasting*, the Board found that a collective agreement which covered the ICI and non-ICI sectors of the construction industry as well as non-construction work was binding beyond the ICI sector on an employer for whom the employer bargaining agency had bargaining rights beyond that sector.

45. In the instant case, the Association holds bargaining rights for its members for the elevator industry in Ontario, including the ICI sector of the construction industry. It also holds bargaining rights in the ICI sector of the construction industry for all other employers for whose

employees the Union has bargaining rights in that sector. These are the independent employers whose names are on Schedule "C" of the Agreement along with the Association's members. The Union has bargaining rights for employees of the Association's members congruent with the scope of the Association's bargaining rights. In addition, the Union has bargaining rights for employees of the independent employers which extend beyond the scope of the Association's statutory bargaining rights for those employers. This is because the Union's bargaining rights in the elevator industry extend to the non-ICI and non-construction parts of the industry for those independent employers. They were bound to the Agreement between the Union and the Association for the ICI sector of the construction industry because of the Association's statutory authority to bargain for and bind them to a provincial agreement for that sector. They were bound to that Agreement also for the rest of the elevator industry because they had voluntarily acceded to it.

46. Therefore, *as between the Association and the Union*, when the Union sought to bargain a single, comprehensive collective agreement for the elevator industry in Ontario, which would encompass a provincial agreement, it was bargaining entirely within the scope of their respective bargaining rights. The Union was neither failing to do something which the province-wide bargaining provisions of the Act compelled it to do nor doing anything which they prohibited it from doing. Therefore, the Union was not taking to impasse something which those provisions required it to do and it had not done, or something which it had done which those provisions prohibited it from doing. The fact that the Union was seeking to have the independent employers accede to the collective agreement as it would apply to the elevator industry, excluding the ICI sector of the construction industry, does not constitute a requirement of the Association that it bargain for those employees. Therefore, the Union was not bargaining an extension of the Association's bargaining rights to include those employers.

47. It follows then, that the Union was not bargaining to impasse the extension of its own bargaining rights or those of the Association. Thus, in these circumstances, *as between the Union and the Association*, it was not unlawful for the Union to bargain to impasse its position that there continue to be a single, comprehensive collective agreement for the elevator industry in Ontario. It is not alleged that it was unlawful for the Union to bargain to impasse with individual employers who are not members of the Association over the single agreement issue with respect to terms and conditions of employment for non-ICI work.

48. With respect to the allegation that the Union refused to consider or offer any alternate proposal to the Association's proposal that there be either separate collective agreements for construction and non-construction work, or separate seniority lists for construction and non-construction employees, having regard to the long bargaining history of the Union and the Association, the facts of their bargaining about those issues since the Anderson award and up to the making of this complaint, the Board is satisfied that the Union has not refused to consider or discuss the Association's proposals.

49. The facts are that in negotiations since the Anderson award, and particularly in 1982, 1984 and 1986, the Association has consistently proposed that there be two collective agreements, or in the alternate, separate seniority lists for construction and non-construction work and has put forward the same justification for its proposals. The Union has responded with its reasons for wanting to retain the single collective agreement for the elevator industry in Ontario; that is, for the protection of its older and longer service members. In the bargaining which gave rise to this complaint, the Association did not make a concrete proposal on seniority until the mediation stage of bargaining, but it had proposed from the outset that there be two separate collective agreements, one for construction and one for non-construction. It did not give any different justification for the proposal than it had in the past and the proposal drew the same response from the Union as

it had in past bargaining. These are two parties in a mature bargaining relationship and where certain proposals are repeated from one bargaining term to the next with no new reasons advanced to support them, there comes a time when it does not take much discussion for the parties to know and understand each other's positions. In the Board's view that time has been reached respecting the related issues of two agreements or two seniority lists. For those issues to be bargained to impasse by the Union after a few hours discussion in the circumstances present here may be hard bargaining, but it does not cross over the line to bargaining in bad faith. That does not mean, however, that the parties' bargaining history relieves them from their obligation under section 15 of the Act to engage in rational discussion about bargaining issues which they have addressed many times where it can be shown that circumstances surrounding the issue require more than a cursory review.

50. Nor on the facts did the Union refuse to consider the Association's proposal to enter into a separate collective agreement for the non-ICI part of the elevator industry. The Association's proposal was that the parties return to the bargaining table for the purpose of negotiating the same collective agreement for non-ICI work as had been negotiated with some individual employers not members of the Association. The Union's response was that it would meet with the Association to negotiate a single collective agreement for the elevator industry. Considering the fact that the Association was reviving the two-agreement demand, albeit in a different form, in light of their bargaining prior to the strike and their bargaining history respecting a single, comprehensive collective agreement for the elevator industry versus two collective agreements, that is an adequate response and is not subject to the qualification expressed at the end of paragraph 49. Therefore, the response, of itself, does not constitute a breach of section 15 in the form of a refusal to bargain.

51. The remaining allegation is that the Union bargained in bad faith after the strike had started, by negotiating with individual employers who were not members of the Association separate collective agreements for the elevator industry in Ontario, excluding the ICI sector of the construction industry. The Association had no bargaining rights for these employers outside of the ICI sector. One effect of making those agreements was to end the strike against those employers outside of the ICI sector of the construction industry, while it continued for the Association's members and for individual employers who did not make a collective agreement for the non-ICI part of the elevator industry. That would not be lawful in the ICI sector because, in addition to subsection 148(2) which prohibits any agreement other than a provincial agreement, subsection 150(1) [formerly subsection 148] of the Act requires that, where an employee bargaining agency calls a strike, all of its affiliated bargaining agents are required to call a strike. Therefore all employers would be struck and the Union cannot selectively strike against some employers and not others. Subsection 150(2) [formerly subsection 148(2)] of the Act places a similar prohibition on lockouts. Subsection 133(1) and (2) [formerly subsections 131(1) and (2)] of the Act provide an analagous protection where an accredited employers association bargains with a trade union. Subsections 133(1), 133(2), 148(2) 150(1) and 150(2) of the Act were legislated in order to curtail interim agreements and selective strikes or lockouts frequently attendant upon such agreements. There are no similar prohibitions against making interim collective agreements during a lawful strike or against a union supplying employees to employers during a strike outside of the ICI sector where the union and the employers are not subject to bargaining under an accreditation order. Therefore, in voluntary multi-party negotiations, it is not unlawful for a particular employer or union to be the target of a strike or lockout and it is not unlawful to achieve that by making an interim collective agreement with some employers or trade unions, and not others. Without more, neither is it bargaining in violation of section 15 of the Act to do those things. That is the position which the Union was in vis-a-vis the employers who were not members of the Association and, while there are substantial grounds for concern that the future bargaining relationship between the two designated bargaining agencies may be adversely affected by the fact that some of the parties bound to

the expired collective agreement have departed from their historical bargaining relationship during a strike, on the facts of this complaint, the Union was not bargaining in bad faith when it made collective agreements with some of those employers.

52. Accordingly, for all of the reasons given above, the Board finds that the International Union of Elevator Constructors and its locals 50, 90 and 96 or any of them have not violated section 15 of the *Labour Relations Act*. In the result, this complaint is dismissed.

2708-90-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Polytech Coatings Limited, Respondent v. Group of Employees, Objectors

Charges - Evidence - Intimidation and Coercion - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert evidence on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that conduct of union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *D. G. Wozniak* and *P. V. Grasso*.

APPEARANCES: *Bertha Greenstein* and *Hassan Yussuff* for the applicant; *Andrew J. Roman*, *Charles R. Robertson*, *Clifford J. Hart*, and *Alan May* for the respondent; *David Zimmer* and *Samuel Owusu* for the objectors.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO;
March 5, 1992

1. In a decision dated February 15, 1991 regarding this application for certification, another panel of the Board (the "Petryshen panel") wrote as follows:

1. The name of the respondent is amended to read: "Polytech Coatings Limited".
2. This is an application for certification.
3. The matter consists of a petition, revocations and various charges made by the applicant, the respondent and the objectors. During the afternoon of February 15, 1991, the scheduled hearing day, the parties agreed that the Board should direct the taking of a representation vote.
4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
5. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
6. The Board is satisfied on the basis of all of the evidence before it that not less than forty-five

per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 29, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. A representation vote will be taken of the employees of the respondent in the bargaining unit described in paragraph 5 of this decision. All those employed in the bargaining unit on the date hereof, who are so employed on the date the vote is taken, will be eligible to vote.

8. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent. While making voting arrangements, the parties requested that the notices and ballots be in the Punjabi as well as the English language. Consistent with the Board's practice, the notices and the ballots will be in English.

9. The matter is referred to the Registrar.

2. The representation vote directed by that decision was conducted on February 28, 1991. Ballots were cast by 98 of the 101 employees whose names were included on the voters' list. Of those 98 ballots, 55 were marked in favour of the applicant (also referred to in this decision as the "Union"), with the remaining 43 ballots being marked against the applicant.

3. The following letter (also referred to in this decision as the "statement of desire") was delivered to the Board on March 8, 1991, which was the final day (under section 70(1) of the Board's Rules of Procedure) for filing a statement of desire with the Board in respect of the representation vote:

A representation vote was held on February 28, 1991 pursuant to the Direction of the Board dated February 15, 1991.

The *Group of Employees as Interveners/Objectors* desire to make representations regarding misconduct on the part of the applicant Union relating to the representation vote and the conclusions the Board should reach in view of the misconduct of the applicant Union. The *Group of Employees Intervener/Objectors* desire a Hearing before the Board in connection with these matters. This application is brought on behalf of the *Group of Employees Interveners/Objectors* by Samuel Owusu... and Amarjeet Grewal.... [The addresses of Mr. Owusu and Ms. Grewal are also included in this part of the letter.]

The following is a concise statement of allegations concerning the representation vote:

1. Many of the employees of the respondent employer are members of the Singh Sabha Gurudwara Temple located at Airport Road in Malton. Surinder Gill and Qamar Ghiassud were in-plant organizers of the applicant Union and members of the Temple. They told various employees of the respondent Employer, in particular Amarjeet Grewal, Gurchran [sic] Dhillon, Rajinder Dhillon and others, that the Temple expected all members of the Temple to support the Union at the representation vote and that those members who did not support the Union would be publicly identified by the Temple. This was a clear attempt to intimidate employees of the respondent Employer and interfere with their right to freely exercise their vote. Censure by the Temple is a matter of such serious religious consequence that this threat may well have coerced members of the Temple to vote in such a way as to avoid censure by the Temple.
2. The representation vote was held February 28, 1991 from 1:30 p.m. to 5:30 p.m. at the Malton Community Centre. A room was set aside in the gymnasium and voters had to pass through a doorway into the gymnasium. On the door, notification was posted by the Ontario Labour Relations Board. In the official form of the Ontario Labour Relations Board there appeared a

sample ballot. The ballot was marked with an "X" in the "yes" portion of the ballot box. Many employees of the respondent Employer are unable to effectively speak and read the English language. At the doorway through which the voters had to pass a group of in-plant organizers of the applicant Union were present during the entire five hour voting period and as voters passed through the doorway this group intimidated the voters and prevailed upon them to mark their ballots "yes". This activity was brought to the attention of the Ontario Labour Relations Board returning officer who removed the Ontario Labour Relations Board document with the marked ballot from the door and has kept it as an exhibit in his file. Many voters as a result of this activity felt intimidated and compelled to mark their ballots "yes". Some of the applicant Union in-plant organizers who formed the group at the doorway were Satpal Uppal, Kamar Ghiassud, Jaswinder [sic] Mann, Kewal Singh, Jaspaul Singh.

3. Gill International Travel is a travel agency located at 7162 Airport Road. It is owned and operated by Darshan Grewal and Lakhvinder Grewal who also have various relatives and family friends who are employed by the respondent Employer. Also Gill International Travel does a considerable volume of business arranging trips back and forth to India for members of the Temple and employees of the respondent Employer. Members of the Temple, employees of the respondent Employer and Gill International Travel were told by in-plant organizers of the applicant Union, in particular, by Kamar Ghiassud, that if the Union was unsuccessful at the representation vote the in-plant organizers of the applicant Union would arrange a boycott of Gill International Travel. This was a clear attempt to influence the outcome of the representation vote by attempting to coerce Gill International Travel to influence employees of the respondent Employer to vote "yes" in the representation vote.

In view of these allegations and in view of the closeness of the representation vote the Objectors/Intervenors desire to make representations to the Board relating to the representation vote and as to the conclusions the Board should reach.

Sincerely yours,

JONES POULTNEY ROGERS

"David Zimmer"
David Zimmer

4. At a hearing held on April 5, 1991, the Petryshen panel heard submissions in respect of a motion by the Union that the facts alleged in the statement of desire failed to disclose a *prima facie* case. In addition to Mr. Zimmer, the persons in attendance at that hearing on behalf of the objectors were Samuel Owusu, Amarjeet Grewal, and Rajinder Dhillon, the three employees whose concerns regarding the representation vote formed the basis of the statement of desire. The Petryshen panel disposed of the motion in the following decision dated May 8, 1991:

1. This is an application for certification.
2. Pursuant to a direction of the Board, a representation vote in this matter was held on February 28, 1991. The majority of those employees who cast ballots voted in favour of the applicant. In a letter dated March 8, 1991, counsel for the objecting employees made certain allegations regarding the conduct of the applicant relating to the representation vote. Having regard to its allegations, the objecting employees request that the Board direct the taking of another representation vote. At a hearing held on April 5, 1991, the Board entertained submissions from the parties on a motion by the applicant that the Board should not entertain any evidence regarding the allegations made by the objecting employees since even if one assumed the alleged facts to be true, the objecting employees would not be entitled to the relief requested.

3. Having considered the nature of the allegations, the parties' submissions and the authorities cited to us, the Board finds in the circumstances that it would not be appropriate to allow the applicant's motion. Accordingly, the Board will hear the evidence and representations of the parties concerning the allegations contained in the March 8, 1991 letter on June 10, 11, and 12, 1991.

5. When this application came on for hearing before the present panel on June 10, 1991, Mr. Zimmer appeared again as counsel for the objectors, along with Mr. Owusu, who served as his advisor. At the commencement of the hearing, Mr. Zimmer advised the Board that Ms. Grewal, who was to have been his other advisor, had instructed him not to proceed on her behalf. He further indicated that he was not at liberty to disclose the basis of Ms. Grewal's decision not to proceed with the matters alleged in the statement of desire. Mr. Zimmer also initially stated that although Mr. Owusu wished to proceed, he was not in a position to offer anything other than hearsay evidence concerning the allegations contained in paragraphs 1 and 3 of the statement of desire, because his direct knowledge was confined to the matters set forth in paragraph 2. After clarifying his instructions from Mr. Owusu during the lunch recess, Mr. Zimmer advised the Board that Mr. Owusu had no evidence to offer in support of the matters raised in the statement of desire, and that he wished to withdraw on behalf of the objectors the allegations contained in that document.

6. It was the position of the respondent (also referred to in this decision as the "Company" and "Polytech", for ease of exposition) that the objectors should not be permitted to withdraw their allegations because they had been intimidated into seeking to do so. The respondent also sought to file for immediate hearing a complaint under section 91 (formerly section 89) of the *Labour Relations Act*, based upon the allegations contained in the objectors' statement of desire.

7. After hearing submissions on those and other related matters, the Board (with Board Member Grasso dissenting) ruled that it would "afford the respondent an opportunity to adduce evidence in support of its allegation that the objectors have been intimidated into seeking to withdraw the allegations contained in Mr. Zimmer's letter dated March 8, 1991". That phase of the hearing continued on June 11 and 12, July 29, and August 6, 1991, and culminated in the following decision dated August 16, 1991:

Having duly considered all of the evidence and the parties' submissions, the majority of this panel of the Board, with Board Member Grasso dissenting, have concluded that, in the circumstances of this case, the interests of justice would be best served by affording each of the parties an opportunity to call evidence regarding the allegations set forth in David Zimmer's letter dated March 8, 1991. Accordingly, the hearing will proceed on September 6 and 13, 1991, as previously scheduled.

Although he did not take an active role, Mr. Zimmer remained in attendance at the hearing of this matter until July 29, 1991, after which he absented himself from the proceedings.

8. The hearing of the merits proceeded on September 6 and 13, October 30, November 8, and December 6, 1991, with final argument being heard on January 30 and 31, 1992. On September 13, 1991, the respondent sought the Board's consent, under section 72(4) of the Board's Rules of Procedure, to adduce evidence regarding certain incidents which allegedly occurred in January and February of 1991. That request was denied by the Board in a decision dated September 20, 1991, for the reasons contained in the Board's decision dated October 29, 1991, in this matter (see *Polytech Coatings Limited*, [1991] OLRB Rep. Oct. 1193). In a decision dated November 4, 1991, the Board denied the respondent's request for reconsideration and reversal of that ruling. The Board's reasons for denying that request were subsequently provided in a decision dated November 25, 1991.

9. During the course of the hearing of this matter, the Board heard testimony from six wit-

nesses called by the Company and one witness called by the Union. In addition to Mr. Owusu, who is employed by Polytech as a painter, and Ms. Grewal, who is one of the Company's quality control inspectors, the respondent called Richard Turner, the Company's Plant Manager; Satish Kumar, another of the Company's quality control inspectors; Dirk Van de Kamer, a Student-at-Law with the respondent's solicitors; and Dr. John W. Spellman, the Director of the Institute of Asian Cultures at the University of Windsor, whose areas of expertise include Sikh culture, religion, and conflict resolution. The sole witness called by the Union was Jaswinder Mann, another of the Company's painters. In addition to their testimony, the Board has before it ten exhibits which were entered during the course of these proceedings. In making the findings and reaching the conclusions set forth in this decision, the Board has carefully considered all of that oral and documentary evidence, the submissions of counsel, and the usual factors germane to credibility assessment, including the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.

10. For ease of exposition, the portions of Dr. Spellman's testimony most directly related to the various specific events to which these proceedings pertain will be quoted or summarized by the Board in paragraphs immediately following the Board's description of those events. However, in deciding this matter, the Board has duly considered not only those portions of his testimony, but also the balance of his evidence. Some parts of Dr. Spellman's evidence were of no assistance to us in these proceedings, as they were based upon the assumption that there had been a threat that persons who did not support the Union would be publicly censured or individually identified in the Temple. No such threat (or rumour of such threat) has been established by the evidence adduced before the Board in these proceedings. The value of other parts of his testimony will be commented upon later in this decision.

11. The respondent is in the business of performing top coat painting of plastic parts for the automotive industry. At the time of the vote, about 95% of the 101 employees on the voters' list were Sikhs, of whom only about 25% were sufficiently fluent in English to converse in it.

12. The aforementioned representation vote was held on February 28, 1991 from 1:30 to 5:30 p.m. at the Malton Community Centre (the "Centre"), which is about a ten minute drive from the respondent's plant. The voting area was located in an auditorium to which access was gained by proceeding through the lobby and along a hallway to the auditorium's double-door entrance. During the balloting, one of those doors was open and the other remained closed. The Board's (Form 69) Notice of Taking of Vote (the "Notice") was posted on the hallway side of the closed door. Mr. Owusu and Mr. Zimmer were the objectors' scrutineers at the vote. Mr. Owusu went in and out of the auditorium seven or eight times while the vote was being conducted. There was no mark on the Notice the first and second time he went out in the hallway. However, when he went out a third time, he noticed that someone had marked an "X" in the circle next to the "Yes" choice on the sample ballot included on that form. He immediately drew this to the attention of Mr. Zimmer and the Board's Returning Officer, who removed the defaced notice forthwith.

13. After briefly describing the voting customs in India, in which marked ballots are commonly circulated by political parties to their supporters to indicate for whom they are supposed to vote, and in which political leaders at the village or community level often hold up marked ballots to indicate to their followers how they are supposed to vote, Dr. Spellman replied as follows when asked how Sikh employees at Polytech who saw the aforementioned sample ballot might interpret the "X" marked on it:

The interpretation might be that this is either a directive from leadership as to the method, as to how you should vote. It might be that this is a consensus that has been reached, or this was the consensus that we reached at an earlier meeting, and remember to vote this way. Others might interpret it as a suggestion. In part, it would depend on other factors. It would depend, for example, on the recency of the arrival of the person. It would depend on the degree of literacy of the person. Persons who have been here a long time, used to Canadian electioneering, might see it that, you know, this is another electioneering pamphlet. So part of the issue, I think, would revolve around the recency of the immigrant's arrival and their acclimatization to the political system here. To the extent that they were seeing it as a reflection of Indian political patterns which they would recognise, then it would probably have a much stronger influence in governing or directing how they ought to vote as members of the group. But otherwise, I mean again, I cannot say and would not say that it would influence all persons to vote according to those instructions. But I think it is fair to say that it would probably influence some, depending on the degree to which they were influenced by Indian political voting patterns and behaviour.

However, Dr. Spellman's evidence on that matter is of little assistance to the Board in deciding this case, as the evidence adduced before us does not establish how many Sikhs saw that marked ballot, nor does it indicate the recency of their arrival or the extent of their acclimatization to the Canadian political system.

14. Mr. Owusu told the Board that in his opinion, Qamar Ghiassud, Satpal Uppal, Jaswinder Mann, Jaspaul Singh, Kewal Singh, and Surinder Gill were in-plant organizers for the Union. It was initially his evidence that on the day of the vote those six people were standing in front of the auditorium doors along with two people who were not Company employees, calling Sikh employees over and talking to them for about ten to twenty minutes before the Sikh employees entered the auditorium to vote. However, during cross-examination he named only the first four of those six people as the ones who were in the hallway, along with the two non-employees who were unknown to him. Later in his cross-examination, he added that there was "one more guy" whose name he could not remember. He also told the Board that the in-plant organizers and the two non-employees were all there from about thirty minutes after the voting commenced until the time the voting concluded. Mr. Owusu further testified that he was unable to understand what they were saying because they were speaking in their native tongue. However, it seemed to him from the way they were using their hands that they were trying "to preach", "to convince", or "to say something".

15. As one of the Company's two scrutineers, Mr. Turner was also present in the auditorium during the vote. From his position at the scrutineers' table, he was able to see part of the hallway through the aforementioned open door. From that vantage point he observed that there were "a lot of people standing outside the door talking and just kind of hanging around the outside of the door", including three that he recognized: Jaswinder Mann, Satinderpal Singh, and a Sikh who had previously been a Company employee but was no longer working for Polytech.

16. Mr. Mann, who was the sole witness called by the Union in these proceedings, gave evidence that conflicted to some extent with that of Messrs. Owusu and Turner. The material portions of Mr. Mann's testimony may be summarized as follows. On the day of the vote, he was driven to the Centre around 1:45 p.m. by his friend and fellow employee Jaspal Rakkar. After arriving in the parking lot, Mr. Mann observed Mr. Owusu coming from the Centre. Mr. Mann was only in the Centre for two or three minutes, during which he saw some people in the lobby and a few other people in the hallway in front of the auditorium. None of those people were from Polytech and he did not know any of them. He waited outside the auditorium for twenty or thirty seconds, without talking to anyone, while Mr. Rakkar voted. They then left the Centre together prior to 2:00 p.m. and drove to the plant, arriving there in time for the commencement of their shift at 2:30 p.m.

17. In the circumstances of this case we find it unnecessary to resolve those evidentiary con-

flicts. Even if Mr. Owusu (and Mr. Turner) were mistaken about the length of time that Mr. Mann was present in the hallway, the remainder of their evidence concerning the presence and activities of other persons in the area immediately outside the auditorium remains uncontradicted. During her cross-examination of Mr. Owusu, Union counsel specifically challenged the credibility of his evidence concerning Mr. Ghiassud by telling him that Mr. Ghiassud would testify that he (Mr. Ghiassud) arrived at the vote at 3:45 p.m., went to the auditorium, observed Mr. Owusu to be the only person standing at the door, went into the auditorium to vote, and then sat in the lobby for the rest of the afternoon. Mr. Ghiassud was present at the Board throughout much of the hearing. However, he was not called as a witness, despite the fact that Mr. Owusu remained steadfast in his aforementioned assertions, and stated firmly and unequivocally that what Union counsel was putting to him was not true. Union counsel also told Mr. Owusu during cross-examination that Jag-roop Singh Dhaliwal would testify that when he arrived at the vote a little after 2:00 p.m., Mr. Owusu was the only person standing at the door. Mr. Owusu's response to that assertion was, "That isn't correct". Union counsel also put a number of other suggestions to Mr. Owusu, presumably on the basis of evidence which she anticipated Mr. Dhaliwal would provide to the Board, including the following:

Q. Well if I suggested to you that you brought him into the production office, and you again asked him to come and testify, and you said to him, "If you want to keep your job, you should come and testify that Qamar said, 'Respect your turban and vote for the union.'" Just answer the question, please.

A. No. Absolutely no.

Q. And did you not say to him or remind him that Rick Turner and Steve Turner had told him that if the union got in, the plant would be closed and the work would be moved to the plant at Plastcoat, Dixon and Meyerside. Do you remember saying those words to him?

A. I never ever. I never ever.

Mr. Dhaliwal was not called to contradict any of Mr. Owusu's adamant denials of those suggestions (nor is there any other evidence before the Board that a member of management (or anyone else) made the assertions suggested in the above-quoted questions).

18. Having regard to all of the evidence, we are satisfied on the balance of probabilities that a group of Union supporters, including some of the in-plant organizers, stood immediately outside the auditorium throughout much of the time that the vote was being conducted and spoke at some length to many of the Company's Sikh employees before they entered the auditorium to vote. Although there is no direct evidence of what they said to those employees, it may reasonably be inferred from all of the circumstances, including the time, location, and manner of speaking described by Mr. Owusu, that they were attempting to convince them to vote in favour of the Union.

19. In commenting on the possible effect upon voters of what Mr. Owusu described in his evidence as having occurred in the hallway outside the auditorium on the afternoon of the vote, Dr. Spellman said there is a "reasonable likelihood" that it might have affected voter behaviour, but that he could not "say that it is a certainty or that it is very likely" without knowing what was said. Thus, Dr. Spellman's evidence is also of little assistance in respect of this aspect of the case.

20. During the course of the Union's organizing campaign, Ms. Grewal was invited to attend a Union meeting at the Singh Sabha Temple (the "Temple") on Airport Road in Malton. Ms. Grewal testified that although she is not opposed to unionization in all situations, she has been opposed to having a union at Polytech "from the start" because she is of the opinion that it is a

good employer which provides satisfactory benefits to all of its employees. Mr. Kumar was also invited to attend a Union meeting at the Temple in February of 1991. That invitation was extended to him in a telephone call from Surinder Gill, another Polytech employee. Mr. Kumar, who is a Hindu, declined to attend that meeting because he thought that the "holy Sikh Temple" was not an appropriate place for a meeting of that type. In this regard he also told the Board, "I think that is not the proper place. That is a religious place, and [a] man can say anything or feel better to [do so] away from there, because that is a religious place."

21. Although neither Ms. Grewal nor Mr. Kumar attended that meeting, it appears probable from the totality of the evidence that a Union meeting was held at the Temple sometime in February of 1991, and that a number of Polytech employees attended. The only evidence before the Board concerning what occurred at that meeting is hearsay evidence given by Mr. Owusu, who was told that Mr. Ghiassud, who is a Muslim, went to the Temple with some of the other in-plant organizers, put on a turban, and said, "In front of your God, respect your turban and vote for the union."

22. In attempting to obtain direct evidence of what occurred at that meeting, Mr. Van de Kamer and Mr. Hart (of counsel for Polytech) attended at the respondent's plant and met with forty-one of the Company's Sikh employees in groups of five to eleven employees to ask them, through a Punjabi interpreter, whether they attended a Union meeting at the Temple and, if so, whether they would be willing to speak with Mr. Hart privately about what happened at the meeting. None of them indicated that they had attended such a meeting, although some stated that they had attended or knew of a social function at which the Union had been discussed at the Temple. Some of them said that this social function took place in January or February of 1991, while others indicated that it took place in March of 1991, after the representation vote. The only employee who said anything to Messrs. Hart and Van de Kamer about a Union meeting at the Temple was Mr. Kumar, who advised them that he had been invited to a Union organizing meeting at the Temple in January or February of 1991, but that he had chosen not to attend because he felt that it was not a proper location in which to hold such a meeting.

23. Part of the evidence which the respondent adduced through Dr. Spellman pertained to the significance of the Sikh Temple or "Gurdwara". He indicated that although it is essentially and fundamentally a religious centre, the Gurdwara is also the centre of the Sikh community. He expressed the opinion that for most Sikhs, the community is generally far more significant than the individual. He further indicated that the lives of practising Sikhs revolve around the Gurdwara, which is the paramount guide for Sikh activities, standards, and conduct. It was his evidence that unless a union meeting was understood to be a Sikh community event, it would not normally be the type of meeting that takes place in a Gurdwara. Thus, he testified that the holding of a union meeting at the Gurdwara "lends towards" the view that union organizing in respect of Polytech was a Sikh community issue, "but does not absolutely cement it". In commenting on the influence which merely knowing of a union meeting at the Gurdwara might have on Sikh employees at Polytech, Dr. Spellman said, "The fact that the meeting is held in the Gurdwara rather than in a cafeteria or in a hotel room or something like that could be influential and significant to some Sikhs but not necessarily to all Sikhs." When asked what influence attending such a meeting might have upon the voting behaviour of Sikhs in a vote about whether to have a union at Polytech, Dr. Spellman said, "If the understanding of those persons was that the decision made in the Gurdwara was essentially a community decision, a decision of the Sikh community, then they would very likely, probably, but not certainly feel bound to support the consensus of the community." After clarifying that by "decision" he did not mean a formal decision put to a vote but rather a general sense of agreement or consensus, he stated that "the fact of it being in the Gurdwara [and] the fact of it being understood to be a community decision of the Sikh community could be significantly influen-

tial in some Sikhs deciding they have a responsibility, an obligation, to not upset that pattern", and went on to say, "But I also add that it does not mean that all Sikhs at that meeting would take a position that they have an obligation. That would not be the case."

24. When Dr. Spellman was referred to the evidence about what Mr. Owusu had been told Mr. Ghiassud said at that meeting, ("In front of your God, respect your turban and vote for the Union"), he testified that this was "a religious appeal of a very high order because the turban, which is one of the five K's of Amritdhari Sikhs - of baptised Sikhs - is a very high order of appeal." He also stated: "It, in my judgment, would have a meaningful significance. When I say it would have a meaningful significance, I don't mean to say that it would be a governing significance. There might be some Sikhs there who could respond by saying, well, that is your opinion, in terms of the turban. But to all Sikhs an appeal through the turban is a high form of an appeal." When asked by respondent's counsel to more specifically relate his answer to whether or not that could have any influence on a vote in relation to the Union, Dr. Spellman said, "You have asked me if it could have an influence, and my answer is yes, it could have an appeal. It might have, but I could not say and would not say that it certainly in all cases would have." He also indicated that his answer would not differ if the person making the statement was a Muslim rather than a Sikh "because the appeal is to a Sikh religious object or article of faith" and because "amongst Muslims also the turban has a very high significance".

25. Gill International Travel ("Gill Travel") is a travel agency owned by Ms. Grewal's husband, Darshan Grewal, and his brother, Lakhvinder Grewal. Gill Travel sells tickets to and from India and other locations. The only evidence adduced before the Board in respect of the above-quoted allegation regarding a threatened boycott of that travel agency is also entirely hearsay. Ms. Grewal testified that she was told by someone that someone else had told other people that if they did not support the Union, that individual would go to the Temple and tell everyone not to buy a ticket from Gill Travel. Ms. Grewal did not indicate who told her that, nor did she name or otherwise identify the person who supposedly made that threat or any of the people to whom it was supposedly made. She did, however, indicate that it had no effect on Gill Travel. After the Union won the vote, Ms. Grewal went to Mr. Zimmer's office along with Gurcharan Dhillon (who is her brother) and Mr. Owusu, to tell Mr. Zimmer what she had heard. Although Ms. Grewal did not know what Mr. Zimmer was going to do with that information, it may reasonably be inferred that she, her brother, and Mr. Owusu hoped that Mr. Zimmer would be able to use it (and the other information provided to him) for the purpose of getting the results of the vote set aside.

26. Dr. Spellman's evidence concerning the possible effect of that rumour was that it could cause considerable alarm to a person who had a relationship to the travel agency. He also testified that the existence of this rumour could evoke a similar response of alarm, apprehension, and anxiety on the part of other people concerned about that person's welfare. In commenting on the possibility of someone using the Gurdwara as a forum for announcing an intended boycott of a business, Mr. Spellman told the Board that "one is certainly capable of doing this in the Gurdwara either during the Langar or before the Langar, after Ardas, which is the final prayer which closes the formal part of the Sikhs' ceremony." After indicating that the Langar is "the community kitchen", he went on to say:

After the formal ceremonies are over, people generally will stand around having discussions and women will generally talk with women, men with men. There is also an opportunity at that time for various persons to get up and make public statements or statements that they would like people to know as a general matter of interest to the Sikh community. Now, if they were to make that kind of a statement in the Gurdwara at that time, for one thing I think people in the Gurdwara, if the statement was made formally and officially from the lectern, would find it a pretty low blow to be making that. I mean that is a personal attack, but if it were simply as a part of the gossip and chatting and rumour that goes on, a person knows that that would have

impact. Not everyone would agree with it, not everyone would decide that because they did not support the Union they would not buy tickets. Those who were solicitors of the family and the family business might urge them to change their attitudes in their own interest and support the Union because it is now tied to their family, and families. Sikh families are not just nuclear they are extended....

27. During cross-examination, Dr. Spellman confirmed that it has never been his position that all Sikhs are going to act in a “monolithic way” on every issue. When Union counsel asked him if it was his evidence that “not every Sikh would see a sample ballot, the presence of the in-plant organisers, and the rumour about the travel agency as a browbeating and direct act of coercion”, he replied:

No. That is not my evidence. My evidence is, it might still be considered as browbeating and coercion, but that does not mean that every Sikh is going to be governed by that and that there may well be some who, in spite of browbeating and threats and so forth, are still going to stand up to that and vote independently. What I am saying is that the balance of probabilities, given the Sikh community and culture values and so forth, is that some will be.

28. The instant case was argued very thoroughly and ably by counsel for the respondent and counsel for the applicant. It is unnecessary to detail in this decision their submissions which, as indicated above, occupied two days of hearing. The essence of the respondent’s position is that a coercive “climate of fear” has been created in which it is unlikely that the true wishes of the employees have been revealed by the representation vote. The orders sought by the respondent include a negation of the vote, a six-month bar, a three-year prohibition of campaigning or office holding by Messrs. Ghiassud and Mann (and other individuals named in the statement of desire) in respect of any union which may be certified at Polytech, and a posting (in English and Punjabi). In the alternative, the respondent asks the Board to negate the vote, order a “cooling off period” of six months during which the Union would be prohibited from organizing at Polytech, prohibit Mr. Ghiassud, Mr. Mann, and other organizers from campaigning or holding Union office to the extent described above, order that a new representation vote be held some time after the cooling off period, and order a posting immediately after the end of that period. Counsel for the Union, on the other hand, contends that the allegations contained in the statement of desire have not been proven, submits that the representation vote does provide a reliable indication of the true wishes of the employees, and asks the Board to certify the applicant on the basis of that vote. Counsel also requested the Board to depart (in conflicting ways) from its normal practice concerning voter eligibility, in the event that a new vote was ordered.

29. Although during the course of argument counsel referred the Board to a number of different sections of the Act (including sections 3, 7, 8, 48 (formerly section 47), 59 (formerly section 58), and 71 (formerly section 70)), the principal issue before the Board in these proceedings is not whether any particular section of the Act has been contravened, but whether the Board should set aside the representation vote conducted on February 28, 1991, and direct that a further representation vote be held. The discretion to do so is given to the Board by section 105(5) (formerly section 103(5)) of the Act, which provides:

Where the Board determines that a representation vote is to be taken amongst the employees in a bargaining unit or voting constituency, the Board may hold the additional representation votes as it considers necessary to determine the true wishes of the employees.

30. The approach which the Board has generally adopted in dealing with requests for the setting aside of representation votes is described as follows in *Greb Industries Limited*, [1979] OLRB Rep. Feb. 89:

14. In evaluating conduct which leads up to the holding of a representation vote so as to deter-

mine whether that vote ought to be set aside, the Board has sought to establish whether the employees were capable of freely expressing their wishes in that representation vote. The party which seeks to set aside a representation vote is required to establish that the impugned conduct has deprived the employees of the ability to freely express their true wishes. See the *Alcan Building Products Limited* case, [1971] OLRB Rep. Dec. 806. The effect of impugned conduct upon the employees is determined by looking at the objective facts of what has occurred and drawing reasonable inferences as to what is the more probable effect of such conduct upon the employees in all the circumstances, see the *Wolverine Tube Division of Calumet & Hecla of Canada Ltd.*, case 63 CLLC ¶16,296. This is an objective test. The Board's approach is to determine the likely effect of the impugned conduct upon an employee of average intelligence and fortitude.

31. Reference may also usefully be made to *Atlas Specialty Steels*, [1991] OLRB Rep. June 728, in which the Board wrote, in part, as follows:

18. In *Concorde Metal Stampings* [1987] OLRB Rep. Jan. 34, the Board made the following comments:

30. ... Where the applicant union, as an institution, suggests that employees will be penalized because of the free exercise of their franchise, the Board may also be inclined to intervene. However, where the allegations concern friction between rank and file employees, the effective administration of the Act and the achievement of its objectives requires a recognition of the fact that for some employees, union representation can be a volatile and emotional issue. Debate may degenerate into bad feelings, ruined friendship and recriminations. While the Board always has the authority to set aside a representation vote and order a new one, that is not a neutral decision, nor one which should be lightly taken and in our view should not be taken unless the occurrences are so serious and pervasive as to render improbable a reliable expression of employee wishes despite the sanctity of the ballot box.

• • • •

19. And finally in *Northfield Metal Products Ltd.* [1989] OLRB Rep. Jan. 57, the Board set out the oral decision it had given at the hearing as follows:

3. The Board is of the unanimous view that no evidence need be heard as the allegations, on the assumption they are true, would not lead us to grant a new vote. The test as applied by the Board is whether or not the actions complained of are coercive or destroy the secrecy of the ballot. The test is not based on the most gullible or the most firm voter, but the reasonable voter who is possessed of critical faculties and the ability to assess issues and inquire on his or her own behalf.

20. Whichever phrasing one prefers, the essential approach and concern remain the same. A new representation vote will not be directed unless the circumstances were such that the Board concludes that, despite the secrecy and reliability of the ballot box, the vote was not likely to have been a reliable expression of the employees' wishes....

See also *Allied Signal Automotive of Canada Inc.*, [1989] OLRB Sept. 927, and *United Plastic Components Ltd.*, [1984] OLRB Rep. Nov. 1636.

32. Some of the Board's earlier decisions in this area, including a number of those cited by respondent's counsel during the course of his submissions, are of limited assistance, as they were decided during an era in which it was the practice of the Board's Registrar to invariably impose a "silent period" prior to the vote, by directing all interested persons to refrain and desist from propaganda and electioneering during the day the vote was taken and for seventy-two hours before that day, pursuant to section 68(j) the Board's Rules of Procedure. (See, for example, *Anderson Metal Industries Inc.*, [1981] OLRB Rep. Apr. 415; *X D G Limited*, [1975] OLRB Rep. Dec. 936; and *Wackenhut of Canada Limited*, [1975] OLRB Rep. Oct. 738.) On the basis of many years of

experience, the Board gradually came to be of the view that such directions created more problems than they solved. (See, for example, the concurring opinion of Board Members Wightman and Cooke in *Tops Food Market*, [1982] OLRB Dec. 1951.) Thus, the policy of imposing a “silent period” in every case was altered on a trial basis in July of 1983. On November 29, 1984, the Board notified the labour relations community, by means of the following policy statement, that it had decided to adopt as its regular practice the policy of not imposing a “silent period”:

BOARD POLICY RELATING TO THE SILENT PERIOD

In July of 1983, the Board reviewed its policy relating to the normal 72 hour “silent period” preceding a representation vote and was of the opinion that litigation over alleged breaches of the “silent period” often prolonged certification proceedings unnecessarily. The Board concluded that the imposition of a “silent period” before a representation vote should be dispensed with, but considered it advisable to implement this change of policy for a trial period of one year. Having closely monitored the impact of the change during this trial period, the Board has decided to adopt the policy of not imposing a “silent period”, as its regular practice. The Registrar of the Board, nevertheless, retains the right under section 68(j) of the Board’s Rules of Procedure to impose a “silent period” in particular cases.

The Board reiterates that the dispensation of the “silent period” should *not* be seen as permitting “wide open” campaigns by parties to a vote. Rather, it is intended to eliminate litigation over technical violations. The Board will, of course, continue to deal with any submissions or complaints alleging that a representation vote has been improperly affected by the conduct of the parties or other persons.

No such direction was requested or made in respect of the vote held on February 28, 1991 in the instant case.

33. The Board has consistently refused to apply a different standard for employees of different ethnic backgrounds in evaluating evidence related to membership evidence and participation in Board processes such as representation votes. In *Dylex Limited*, [1977] OLRB Rep. June 357 (application for judicial review dismissed: *Re Marques et al. v. Dylex Ltd. et al.* (1977), 81 D.L.R. (3d) 554 (Div. Ct.)), the Board wrote as follows in rejecting an argument that, in determining (among other things) whether or not the true wishes of the employees were likely to be ascertained by a representation vote, the Board should take into account that many of the bargaining unit employees were immigrants:

5. ... The Board is called upon with ever increasing frequency to concern itself with bargaining units comprised to a greater or lesser extent of fairly recent immigrants to Canada and it is not uncommon to have such persons testify for one reason or another before the Board. Our experience in this regard has taught us that employees who are immigrants are not, only because they are immigrants, somehow more easily influenced or more incapable of making their own decisions than are other employees. Some individuals appear to be possessed of greater fortitude than do others. Similarly there are some individuals who by their very nature may be easily influenced and who tend to perceive threats in circumstances where most others would not. However, these are reactions which appear to be based on individual temperament and character rather than on any general characteristics of language or former country of residence. This being the case we are of the view that no inferences can be drawn as to the possible susceptibility to influence of employees in the bargaining unit on the grounds only that many of them immigrants from abroad.

See also *Northfield Metal Products Ltd.*, [1989] OLRB Rep. Jan. 57, and the other decisions cited in paragraph 5 thereof.

34. We respectfully agree with those decisions and find nothing in the instant case that warrants a departure from that approach. A majority of the panel (with Board Member Grasso dissenting) decided to permit the respondent to call Dr. Spellman as an expert witness because we

were persuaded that at least some of the evidence which respondent's counsel sought to adduce through him was of arguable relevance to matters in issue in these proceedings. Although Dr. Spellman is obviously quite knowledgeable regarding Sikh culture, religion, and dispute resolution, and gave his evidence in a very professional, thorough, and fair-minded manner, the Board has found it to be of little assistance in deciding this matter for the reasons indicated in paragraphs 10, 13, and 19 of this decision, and for the following further reasons. Dr. Spellman's evidence regarding the significance of a union meeting being held in the Temple, was merely that it "could be" influential and significant to "some" Sikhs. Moreover, his suggestion that some Sikhs might feel that they had a responsibility or obligation to vote for the Union was premised on there having developed a consensus within the Sikh community that the Sikhs employed at Polytech should support the Union. We are not satisfied on the evidence adduced before us that any such community consensus did in fact develop. Moreover, even if it did, such consensus would really amount to nothing more than a somewhat heightened form of peer pressure. The Board has long recognized that peer pressure is operative, to a lesser or greater extent, in most union organizing campaigns, and has generally found it to be irrelevant to the reliability of membership evidence or the results of a representation vote: see, for example, *National News Company Limited*, [1990] OLRB Rep. Aug. 870, at paragraph 16, and *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, at paragraph 49. Nothing in the circumstances of this case warrants the adoption of a different approach by the Board.

35. As noted above, the only evidence adduced before the Board in support of the allegations contained in paragraph 3 of the statement of desire was the hearsay evidence of Ms. Grewal that an unidentified person told her that another unidentified individual told other unidentified people that if they did not support the Union, that individual would go to the Temple and tell everyone not to buy a ticket from Gill Travel. Although the Board has a discretion (under section 15(1) of the *Statutory Powers Procedures Act*) to act upon hearsay evidence (and other evidence inadmissible in a court), the Board generally declines to do so in the absence of compelling reasons (such as the statutorily recognized desirability of protecting the identity of persons who sign membership cards, petitions, or counter-petitions: see section 113(1) of the *Labour Relations Act*). The unidentified person who told Ms. Grewal about what another unidentified individual supposedly said has not been placed under oath nor subjected to cross-examination to test such pertinent matters as his or her perception, memory, and credibility. Thus, giving probative weight to such evidence would create an obvious unfairness to the opposing party, which cannot meaningfully cross-examine upon it and thereby test its accuracy and reliability. Nothing in the circumstances of the instant case persuades the Board to depart from its usual practice in that regard. Moreover, even if we were to rely upon Ms. Grewal's hearsay evidence as establishing that someone had made a threat of that type, there is no evidence linking that threat to any Union official or in-plant organizer, nor is there anything before the Board which would warrant a finding that the existence of such threat likely affected the vote in a material way.

36. If the making of such threat had been duly proven, Dr. Spellman's evidence concerning the manner in which it could be carried out in the Temple might have been of some assistance to the Board in assessing the potential impact of such threat, although most of his evidence concerning its potential effect is simply the equivalent of what one would reasonably presume or infer in any event.

37. Our comments concerning the alleged Gill Travel boycott threat are equally applicable to what Mr. Owusu testified he had been told Mr. Ghaissud said at the Union meeting held in the Gurdwara. The Board is not prepared to give any weight to that hearsay evidence in the circumstances of this case. Moreover, in the absence of any evidence concerning such material matters as the identity of the person or persons to whom the statement was directed, the number of Sikh

employees in attendance at the meeting, the seriousness with which the statement was made, and the reaction, if any, which it elicited from employees at the meeting, the Board would not be in a position to meaningfully assess the probable impact of such statement in any event. Although parts of Dr. Spellman's evidence could potentially have been of some assistance in understanding the significance of the statement in the context of Sikh religion and culture, his opinion that it "could" or "might" have an appeal is of no real assistance. Indeed, that response and the other similar ones described above reflect the inherent weakness of expert testimony of this type, which must of necessity be confined to largely unhelpful generalizations.

38. For the foregoing reasons, the Board has concluded that nothing has been established by cogent evidence as having occurred prior to the day of the vote which would prompt the Board to direct a new vote. We turn next to a consideration of the events which occurred on the day of the vote. The fact that the sample ballot was defaced in the manner described above does not warrant the holding of a new vote. It appears from the evidence that the defaced ballot only remained on the auditorium door for a relatively short period of time and there is no evidence that any of the voters other than Mr. Owusu (who was clearly not affected by it) saw it, much less that they were in any way influenced by it. As soon as he observed the defaced ballot during his third of seven or eight trips out into the hallway, Mr. Owusu drew it to the attention of Mr. Zimmer and the Board's Returning Officer, who removed it forthwith. Although it may reasonably be inferred that the sample ballot was defaced in that manner by a Union supporter, there is no evidence before us that it was done by a Union official or in-plant organizer. Moreover, although it was a breach of the defacement prohibition included in the Notice, we are of the view that the defacement of the sample ballot was not coercive and did not create a situation in which the vote was unlikely to have been a reliable expression of the employees' wishes. (For a case in which the Board declined to direct a new representation vote on the basis of a similar defacement, see *Northfield Metal Products*, [1989] OLRB Rep. Jan. 57, at paragraph 6.)

39. We are, however, somewhat troubled by the other impugned occurrence on the day of the vote. As indicated above, we are satisfied on the balance of probabilities that a group of Union supporters, including some of the in-plant organizers, stood immediately outside the auditorium throughout most of the time that the vote was being conducted and spoke at some length to many of the Company's Sikh employees before they entered the auditorium to vote. As further indicated above, although there is no direct evidence of what they said to those employees, it may reasonably be inferred from all of the circumstances, including the time, location, and manner of speaking described by Mr. Owusu, that they were attempting to convince them to vote in favour of the Union. During the aforementioned era in which the Board (through its Registrar) imposed a "silent period", conduct of his type would undoubtedly have prompted the Board to direct a new vote. (For an example in which the Board did so in a somewhat similar situation, see *Anderson Metal Industries*, [1981] OLRB Rep. April 415.) However, in the absence of a direction prohibiting it, a union and its supporters are at liberty to engage in propagandising and electioneering on the day of the vote, so long as their activities are not intimidatory, coercive, or otherwise destructive of the employees' freedom to vote as they wish on the matter of union representation.

40. The circumstances of the instant case fall close to the line. A union which permits its organizers or supporters to congregate immediately outside the voting area while the vote is in progress and to engage in electioneering or propagandising at that time and location risks not only lengthy proceedings before the Board, but also the possibility of a new vote if the statements made to the employees are intimidatory, coercive, or otherwise destructive of their freedom of choice. It is not beyond the realm of possibility that intimidatory or coercive statements were made to Sikh voters by one or more members of the aforementioned group in the instant case. However, it is at least equally likely that they merely discussed with them what they perceived to be the advantages

of unionization. On balance, we have concluded that the evidence adduced before us does not warrant a finding that their conduct was intimidatory, coercive, or otherwise preclusive of the vote being a reliable expression of the employees' true wishes.

41. For the foregoing reasons, the request for a new representation vote (and the other relief described above) is hereby denied.

42. A certificate will issue to the applicant for the following bargaining unit:

all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

DECISION OF BOARD MEMBER D. G. WOZNIAK; March 5, 1992

1. I dissent from the majority decision.

2. The majority decision contains an excellent, detailed and fair exposition of the facts in this matter and therefore, it is not necessary to repeat them in this dissent except to record that I give greater weight and reach different conclusions concerning certain events.

3. In my opinion, there was intimidation and coercion of the Polytech employees in a number of instances cited in the evidence, but there were two major events which illustrate the conclusion I have reached:

- i) The events surrounding the vote and in particular the marked sample ballot, the congregating of union in-plant organizers and the accosting of voters at the entrance to the polling area during most of the time that the vote was conducted. I have inferred that these activities were intended to influence Sikhs to vote in favour of the union. As an aside, I would add that the mere fact that there were at least six (6) individuals at the entrance by itself would be intimidating;
- ii) The union meeting held at the Gurdwara. Dr. John W. Spellman, the expert witness, who gave the Board an excellent understanding of the complexities of Sikh culture and religion, testified that holding a union meeting in the Gurdwara could influence some Sikhs to vote in favour of the union. While the majority of the Board did not give weight to this event or Dr. Spellman's testimony on this issue, I feel it has been underrated as it relates to the "climate" which prevailed during the union organization drive up to and including the vote. In matters of this nature, when dealing with such notions as culture, individuals' responses to cultural pressures, etc., it is impossible to be specific. Even though Dr. Spellman's testimony was couched in conditional terms, I would give it greater weight.

4. The evidence is, in my opinion, sufficiently strong to justify a finding of intimidation or coercion which contravened section 71 [formerly section 70] of the *Labour Relations Act*, and which resulted in the true wishes of the Polytech employees not being determined by the representation vote conducted on February 28, 1991.

5. Accordingly, I would exercise the discretion in section 105(5) [formerly section 103(5)] and order a new vote to be conducted. Legal counsel for the respondent requested that the Board

order a “cooling-off” period before a vote should the Board order one. I do not agree that a “cooling-off” period is necessary as this matter has been pending now for over a year and in effect there has already been a “cooling-off” period. I would order that the new representation vote be conducted as expeditiously as possible.

6. Legal counsel for the respondent also requested an order barring the in-plant union organizers from campaigning or holding union office for a period of time. I do not agree with this request; I believe it is unprecedented in labour jurisprudence and I do not see sufficient reason for changing the practice of the Board.

7. With respect to the question of who should be eligible to vote, I would hear representations from the parties as no doubt the labour force at Polytech has changed, perhaps significantly, since the original vote.

1567-91-FC Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. Romatt Custom Woodwork Inc., Respondent

Evidence - First Contract Arbitration - Board applying *Great Lakes Community Credit Union* case and declining to hear evidence of amended negotiating position made after application date - Board satisfied that employer’s bargaining positions with respect to union security and foremen doing bargaining unit work taken without reasonable justification - Board also satisfied that refusal to recognize the bargaining authority of the trade union underlying employer’s position in bargaining - Board directing arbitration of first collective agreement

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. A. Correll* and *J. Kurchak*.

APPEARANCES: *N. L. Jesin*, *R. Balkissoon* and *C. Mannella* for the applicant; *Robert W. Cosman* and *M. DeMonte* for the respondent.

DECISION OF THE BOARD; March 24, 1992

1. By decision dated December 5, 1991 we directed the arbitration of the first collective agreement between these parties. We now provide our reasons for that direction.

2. This application was filed on August 2, 1991. Hearings were held on September 16, October 16, and December 2, 1991. Prior to commencing the hearings the parties agreed to waive the time limits contained in section 41 [formerly section 40a] of the *Labour Relations Act* (the “Act”).

3. We note that during the course of the hearing the respondent attempted to introduce evidence of an amended negotiating position made after the application date herein. We ruled that for the reasons expressed in *Great Lakes Community Credit Union Ltd.* [1991] OLRB Rep. June 758 and adopted in *Wendy’s Restaurants* [1991] OLRB Rep. Oct. 1241 we were not prepared to hear evidence of matters occurring after the application date.

4. We do not intend to review all of the evidence heard over the course of the hearing but

simply to highlight the chronology of events and those matters which led us to our conclusion to direct the arbitration of the first collective agreement.

5. Following its certification on August 9, 1990 the applicant filed notice to bargain on August 23, 1990. Negotiations commenced on September 25, 1990 at which time the union tabled its proposals. The next negotiating session was held October 24, 1990 when the company tabled its proposals in response. The parties were agreed that from October 24, 1990 to the date of the filing of this application on August 2, 1991 the respondent did not change any of its proposals from those put forward on October 24, 1990. The applicant applied for conciliation in February, 1991 and on April 23, 1991 the parties met in conciliation. They met again on May 24, 1991 with the conciliation officer although nothing was accomplished.

6. It was the position of the respondent that negotiations stalled because of the intransigent position taken by the applicant in proposing a union shop union security provision as a condition precedent to negotiating other issues. It was the further position of the respondent that as a result, negotiations did not run their course, the parties have not tested their positions through a negotiating process and the process could not be said to be unsuccessful. It was the applicant's position that while it had tabled a union shop proposal and that while it was the major stumbling block in the negotiations, the applicant was at all times prepared to continue negotiations, however in the face of the conduct of the respondent, negotiations could not and did not proceed.

7. With respect to whether the process of collective bargaining had been unsuccessful, we were satisfied that as of the date of application the parties had clearly become entrenched in their positions, most particularly with respect to the union security provision and that negotiations were at an impasse. Between the period September 25, 1990 through to August 2, 1991 the parties had negotiated on five separate occasions with the assistance of a conciliation officer for two of those meetings and had achieved little, if any, agreement.

8. The difficulty between the parties was the applicant's proposal for a union shop, that is, a union security provision to be included in the collective agreement stipulating that once hired by the respondent and having completed their probationary period, an employee would be required to become and remain a member of the applicant. On October 24th the respondent proposed a "Rand Formula" type union security provision (also excluding probationary employees from its ambit).

9. There was no dispute between the parties that the union security issue was at an impasse at the time that this application was filed and that the issue was joined early in the negotiations. The respondent was aware almost from the outset that the applicant considered it to be an issue of fundamental importance for it. The applicant was of the view that in the face of the respondent's conduct during the applicant's organizing campaign and certification that it required additional security. On November 21 the applicant made clear that it was prepared to concede wages in exchange for union security protection.

10. It was the respondent's position both in negotiations and before the panel that it was not prepared to agree to a provision that it perceived as removing the freedom of choice from its employees with respect to their decision to join or not join a trade union. On November 21, 1990 in negotiations Mr. DeMonte, the principal officer and guiding mind of the respondent expressed to the applicant his fear that customers might be reluctant to deal with the company in the face of a union shop provision. The respondent manufactures cabinet doors for use in the residential construction industry. The union responded by advising the respondent of a number of collective agreements to which it was a party and which included such a provision. The applicant further indicated its willingness to make changes in other areas in exchange for union security. At the hearing,

the applicant's Business Representative testified that the applicant was party to approximately 35 industrial shop collective agreements, all of which contained a union shop provision.

11. This dispute must be put in its historical context. The applicant applied for certification on September 29, 1989 for a bargaining unit of employees of the respondent. A certificate issued pursuant to section 8 of the Act on August 9, 1990. Section 8 provides an extraordinary remedy wherein the Board may certify an applicant trade union absent the normal membership requirements when the Board is satisfied that as a result of an employer's conduct in contravening the Act, the true wishes of the employees are not likely to be ascertained, and provided the trade union has membership support adequate for collective bargaining. The respondent admitted violating the Act in the manner it had conducted certain lay-offs. The decision of the Board at that time (reported at [1990] OLRB Rep. Rep. 894) dealt with the unfair labour practice complaint and the certification application to determine, essentially, what were the appropriate remedial consequences. In concluding that it was an appropriate case to apply section 8 of the Act and certify the applicant the Board said the following about the effect of the lay-offs:

17. The second factor is that as a result of the contravention of the Act the true wishes of the employees are not likely to be ascertained. In this case, in direct response to the fact of the trade union in the workplace, the employer laid off twenty-five percent of the employees in the proposed bargaining unit. There was no advance notice to any of the employees concerning the lay-off and notwithstanding that we have found that the respondent planned a lay-off for September 29th in any event, that fact remained unknown to the employees. The lay-off occurred moments prior to the union convening its first general meeting of the employees. There can be no doubt that the effect of such a lay-off would be to send a clear message to employees that the fact of union representation would seriously jeopardize their job security.

...

20. Although we have found that the individuals who were laid off were chosen primarily on the basis of seniority or on the basis of their particular skills and not because they were union supporters, that fact may well not have been apparent to the employees. The union's organizing campaign had initially been directed at those employees who were Spanish-speaking. The majority of the employees laid-off fall into this category. In determining whether the true wishes of the employees are not likely to be ascertained we must have regard to the reasonable perceptions of the employees. The timing and extent of the lay-off and the individuals actually laid-off, in this case coming immediately prior to the union's first general meeting and with no prior knowledge to the employees, in our view could only send one message to the employees. In such circumstances a vote would not likely disclose whether the employees wish to be represented by a trade union but rather whether they wished to maintain some job security.

...

13. The conclusion reached in the Board's decision in the certification application and unfair labour practice complaint is that the respondent was willing to and did interfere with its employees' ability to freely choose whether or not they wished to be represented by a trade union. It is in that context that the same issue arose in the negotiations in response to the applicant's proposal on union security. It was Mr. DeMonte's position throughout that employees ought to have their freedom of choice and on that basis he maintained his position.

14. Counsel who had acted for the respondent at the certification and unfair labour practice hearings testified on behalf of the respondent in this application. She was also the spokesperson for the respondent in the negotiations for the first collective agreement. In cross-examination she was asked questions concerning this issue of employee freedom of choice. She acknowledged that the employer's actions at the certification had been in violation of then sections 64 and 66 of the Act and were improperly motivated. She accepted that the Board had found that as a result of that con-

duct the true wishes of the employees were not likely to be ascertained. On being asked whether this meant that the employee's freedom to choose whether to join a trade union or not had been interfered with she answered that she was unaware as to whether the employees' freedom to choose had *actually* been interfered with. On that basis she attempted to distinguish the employer's actions at the time of the certification from its position in negotiations. The Act does not rely on evidence of actual interference. It does not validate an employer's attempt to interfere with an employee's ability to freely choose whether to join a trade union or not merely because a particular employee happens to be able to withstand the employer's interference and remain unaffected by it. Nor does it consider whether an employee is so offended by the interference that the employee is moved to support a trade union when they otherwise would not. The point of the legislation is to prohibit improper interference with that expression of choice. In this case the interference at the time of certification consisted of an actual loss of work to twenty-five percent of the bargaining unit in direct response to the respondent's knowledge of the trade union's organizing campaign.

15. Another key issue between the parties in the negotiations concerned whether or not foremen could perform bargaining unit work. The union had proposed that bargaining unit work be protected (Article 2.02 and 2.04 of tab 6 of the applicant's brief). In response Article 4.05 was proposed by the respondent which reads, "It is understood that foremen of the company also perform work which is performed by members of the bargaining unit". It was the position of the respondent in negotiations that due to the nature of its operation it was necessary for foremen to perform occasional work of the bargaining unit, for example, the preparation of samples which had to be done quickly and well. The respondent did not anticipate that foremen would be used extensively to perform bargaining unit work in that it would be too expensive. The applicant countered to the respondent's proposed Article 4.05 on November 21, 1990 in an attempt to take into account purposes of instruction, experimenting, or in emergencies when regular employees were not available. The applicant expressed its concern that bargaining unit members not be laid-off as a result of foremen performing bargaining unit work. On November 21, 1990 the respondent indicated it would look at the issue of protecting against lay-offs for the bargaining unit so long as it would not be in a position that employees on lay-off would have to be recalled. At that point the applicant was prepared to withdraw its proposals for protection of bargaining unit work. As of the date of application, however the respondent's original proposed Article 4.05 remained on the table, notwithstanding an expressed intention not to use foremen to perform bargaining unit work as widely as its proposal would allow.

16. Throughout the negotiations the respondent was experiencing serious financial difficulty. These difficulties were of such a nature that in their negotiation on November 21, 1990 the parties agreed to adjourn pending the outcome of meetings which Mr. DeMonte was having with his bankers on December 10, 1990. The respondent asserted at that time that without additional re-financing and the opportunity to restructure financially, it might not exist after December 10.

17. It would appear that both parties felt it was incumbent on the other party to make contact following the respondent's meeting with its banker on December 10 in order to continue the negotiating process. The fact is that notwithstanding short unrelated conversations in early 1991 neither side made reference to the negotiations or the outcome of the December 10 financing meeting until after the applicant applied for conciliation on February 14, 1991. It is fair to conclude that on April 23 and May 24, 1991 little, if anything, was accomplished at conciliation.

18. Much of the respondent's evidence and argument was directed to the position that the trade union had created its own impasse in bargaining by refusing to negotiate any other issues until the union security issue was resolved. While we are satisfied that the union undoubtedly made some strong statements about the importance to it of the union shop security provision we cannot

conclude on the evidence that it was otherwise unprepared to negotiate other issues. Even on the evidence of both witnesses for the respondent it is apparent that on November 21, 1990 by which time the union security issue had already been joined, the parties did discuss other proposals. The applicant tabled counter-proposals. Mr. DeMonte testified that on November 21 the parties went over every paragraph and clause of the agreement while acknowledging that the union security proposal was a “sticky point”. Those negotiations were side-tracked when the applicant made its suggestion for compromise on wages in exchange for union security. The respondent indicated that it was not able to make any monetary offer in any event and the existence of the anticipated December 10 meeting with the bankers was discussed. We note that notwithstanding the position taken by the respondent on November 21, as of the date of application it continued to operate although it did not secure alternate financing arrangements at the meeting of December 10.

19. In the circumstances we were satisfied that the applicant had shown that the process of collective bargaining had been unsuccessful because of the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification and the refusal of the employer to recognize the bargaining authority of the trade union (section 41(2)(b) and (a)). There is no doubt that the employer’s position on union security was uncompromising. It was prepared to accept only a modified Rand Formula provision (as it would be required to accept by virtue of section 44 [formerly section 43] of the Act). In all the circumstances we were satisfied that uncompromising position was taken without reasonable justification.

20. The interpretation of “without reasonable justification” in section 41(2)(b) was discussed in *Formula Plastics Inc.* [1987] OLRB Rep. May 702 as follows:

24. But was the employer’s position taken without reasonable justification? Much depends on our interpretation of “reasonable” in this regard. Obviously the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself. However, in our view, “reasonable” must mean something more than simply a rational relationship between a bargaining position and a party’s self-interest. This test is so minimal that it would make the relief provided by section 40a(2)(b) virtually inaccessible, a result which we find inconsistent with the remedial nature of this provision. Reviewing the section as a whole, and having regard to the Board’s analysis in *Nepean Roof Truss, supra*, and *Juvenile Detention Centre (Niagara)*, [1987] OLRB Rep. Jan. 66, we find it difficult to conclude that the legislation was designed to do no more than ensure that parties were looking after their own interests in a logical way.

25. Rather, in our view, the word “reasonable” imports an objective element into our consideration of the respondent’s justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent’s point of view, or even from the applicant’s. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

27. Moreover, while the Board has had occasion to scrutinize negotiations in the past, notably in the course of determining bad faith bargaining complaints, the nature of our inquiry under section 40a is significantly different. The jurisprudence developed under section 15 reflects a conscious intention to avoid reviewing the fairness or reasonableness of negotiating proposals as an exercise in itself (see for example, *Canada Trustco*, [1984] OLRB Rep. Oct. 1356). Rather, the Board’s interest on a section 15 inquiry centers on whether a manifestly unreasonable proposal indicates the presence of bad faith on the part of a party, or a failure to make every reasonable

effort to make a collective agreement. To the extent that section 40a requires us to examine the intrinsic reasonableness of a negotiating position, it represents a departure from the jurisprudence which has revolved under section 15.

28. The variety and social authority of the competing interests involved, together with the complex dynamics of the collective bargaining process make this task a difficult one. It requires a delicate assessment of the many differing factors which may be operating in and upon a given labour relationship, an assessment which must be approached from a perspective closely attuned to the practices and climate of labour relations at any particular point in time. Indeed, it is fair to say that this is a provision which will require the Board to draw heavily on its own expertise in labour relations.

21. The respondent argued that its position on the union security proposal was a principled one. Yet its actions and position do not substantiate that view on an objective basis. Inherent in the respondent's position is the view that the trade union could not or was not putting forward proposals which the employees themselves endorsed. The trade union is the bargaining agent of the employees. Arguably the nature of any union security protection (and the employee's then expression of choice) is primarily a matter between the trade union and the employees in the bargaining unit that it represents, and may be of less concern to an employer. In assessing the employer's justification we note that no counter proposal was offered by the respondent which might more directly go to this issue of choice (for example, a "grandfathering" provision for current employees). Nor was any employer interest identified as requiring recognition or protection in the context of this proposal except a vague and unsubstantiated fear that customers might be reluctant to deal with the respondent as a union shop. In response, the applicant was able to show the respondent that in its experience a union shop provision was by no means unusual or uncommon in collective agreements in industrial shops catering to the construction industry. The respondent's position on the performance of bargaining unit work by foremen also remained outstanding. In the face of no apparent financial or other impact on it, the respondent was prepared to run the risk of prolonging the negotiations, engaging in expensive litigation, and jeopardizing its very existence. The respondent did not attempt to test or seek to capitalize on the applicant's apparent willingness to negotiate other issues in exchange for security. This position was being maintained by an employer who had been willing to interfere with employees' freedom of choice at the time of organizing. That would not automatically or necessarily speak to its subsequent conduct. However, it is not surprising that the applicant took a stronger position on this issue following its experience in the organizing and certification process, in light of the respondent's position on the issue of foremen doing bargaining unit work, and in light of its experience elsewhere in the industry. We note that no justification was provided by the respondent for maintaining its original (and uncompromising) position on the issue of foremen doing bargaining unit work. We were satisfied that the process of collective bargaining had been unsuccessful because of the bargaining positions adopted by the respondent with respect to these two issues (union security and foremen doing bargaining unit work) and that they were taken without reasonable justification.

22. Having regard to those same circumstances we were also satisfied that underlying the respondent's position in bargaining was a refusal to recognize the bargaining authority of the trade union. The issues leading to the impasse in bargaining go to the security of the bargaining agent and the integrity of the bargaining unit. While Mr. DeMonte may in a sense sincerely feel he cannot agree to a union shop provision we are of the view that this position results from his failure or inability to accept the trade union's presence in his workplace. He was prepared to run the substantial risk of losing his business rather than negotiate this issue with the applicant. Union security provisions will not create "recognition" issues in every negotiation. However, in the context of the respondent's conduct during the organizing campaign and its stated position in negotiations we were persuaded that the process of collective bargaining had been unsuccessful because of the refusal of the employer to recognize the bargaining authority of the trade union.

23. For those reasons we directed the arbitration of the first collective agreement between the parties.

3133-89-R International Brotherhood of Electrical Workers, Applicant v. Siteco Electric Ltd. and Leo Alarie and Sons Limited, Respondents v. International Union of Operating Engineers, Local 793, Intervener

Certification - Construction Industry - Employee on training course held not "at work" in the unit for purposes of the count - Board rejecting argument that four employees at work in proposed bargaining unit on the application date should be included on list of employees even though they were not qualified pursuant to *Trades Act* to work in the electrician trade - Board holding that even if lawfully employed, the four employees would share no real community of interest with the journeymen and apprentice electricians

BEFORE: N. B. Satterfield, Vice-Chair, and Board Members D. A. MacDonald and N. Wilson.

APPEARANCES: L. A. Richmond, L. Lineham and M. J. Lewis for the applicant; Harry Freedman, Chuck Humphrey and Carole Truchon for the respondents; Maurice A. Green, Jack Slaughter and Michael Quinn for the intervener.

DECISION OF THE BOARD; March 31, 1992

1. This application for certification was made under subsection 146(1) [formerly subsection 144(1)] of the construction industry part of the *Labour Relations Act* on March 16, 1990. It came before a different panel of the Board for hearing on April 20, 1990 and, following some substantive and procedural decisions respecting the application, it was adjourned *sine die* on agreement of the parties. That panel was not seized with the application. Subsequently, the parties agreed that the application should be re-listed for hearing in order to determine the remaining issues. Accordingly, it came before this panel of the Board on May 7, 1991 for the purpose of receiving the parties evidence and representations on whether:

- (1) any of Messrs. Michael Therrien, Dan Laforest and Bernard Monderie can lawfully perform work in the bargaining unit (described at paragraph 1 of the November 2nd decision) on behalf of the respondent Leo Alarie and Sons Limited and, therefore, be included in the unit even though he is not a qualified electrician or electricians' apprentice under the *Trades Qualification Act*, R.S.O. 1990, c.T-17 [formerly the *Apprenticeship and Tradesmen's Qualification Act*];
- (2) on March 20, 1990, John Milroy was an electrician or registered electricians' apprentice within the meaning of the *Trades Qualification Act*;
- (3) on March 20, 1990, Ray Kensley, Blain Baker and Shawn Burrows were at work in the bargaining unit; and
- (4) the intervener is the exclusive bargaining agent for the respondent's

electricians and electricians' apprentices employed in the construction industry in Ontario, excluding the industrial, commercial and institutional sector.

2. The parties had agreed in the earlier proceedings that the respondents should be declared as constituting one employer for purposes of the Act pursuant to subsection 1(4) of the Act. The Board declined to make any declaration pending notice to the respondents' employees of the application for the declaration. The Board directed that notice be given to the employees and advised the parties that no hearing would be needed if no employee submitted a statement of desire in accordance with the notice. None was made. Therefore, when these matters came before this panel of the Board at the hearing on May 7, 1991, having regard to the agreement of the parties, the Board declared that Siteco Electric Ltd. and Leo Alarie and Sons Limited carry on related activities or businesses under common control or direction within the meaning of subsection 1(4) of the *Labour Relations Act* and, pursuant to that subsection, are to be treated as constituting one employer for purposes of the Act.

3. The Board accepted also the agreement of the parties on the following substantive and procedural matters:

- (1) John Milroy is not an apprentice electrician as defined by the *Trades Qualification Act* and its regulations, although the applicant reserved its right to take the position that he was an employee in the bargaining unit on the same grounds that any employee named in item (1) above might be found to be in it.
- (2) Ray Kensley was not at work on March 20, 1990 and is not to be counted as in the bargaining unit on that date.
- (3) The issue of whether Shawn Burrows was at work in the bargaining unit on March 20, 1990 and the issue set out in item (4) above are set aside for later determination, if needed, together with the allegation that the Board ought not to rely on the applicant's membership evidence because it was obtained with the assistance of Tyler Card, who is alleged to be a former member of management with Siteco having a significant degree of control over employees' working times.
- (4) The Board should receive the parties' evidence and representations and determine whether any of Michael Therrien, Dan Laforest, Bernard Monderie and Blain Baker were at work in the bargaining unit on March 20, 1990.

The parties did not agree on the order in which the Board should determine the issues described in item (3) of this paragraph, or, if needed, the residual issue in item (1).

4. The Board is required by subsection 7(1) of the Act to "... ascertain the number of employees in the bargaining unit *at the time the application made ...*" when determining an application for certification. When an application is brought under the construction industry part of the Act, as this one was, the Board satisfies that mandate by "counting" only those persons who were employed by the respondent employer on the date of making of the application and were actually at work in the bargaining unit on that date; in other words, employees who spent the majority of their time on that date doing bargaining unit work. See *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41, at paragraph 12, and other Board decisions referred to therein.

5. It is common ground here that the appropriate tests for deciding the “count” issues in this application are those which were suggested in *Seegmiller Limited, supra*, at paragraph 23 and first applied in *Gilvesey Enterprises Inc.*, [1987] OLRB Rep. Feb. 220. They are:

- (a) whether the person at issue was employed by the respondent and at work on the date of application; and
- (b) if so, the work that the person spent the majority of his/her time doing on the date of application or,
- (c) where there is no conclusive evidence with respect to the work that the person performed on the date of application, any other relevant factor, including the primary reason for hire.

6. The bargaining unit which the applicant proposes to be appropriate for this application is described in terms of electricians and electricians’ apprentices. The trade of electrician is a compulsory, certified trade under the *Trades Qualification Act* (hereafter “the *Trades Act*”). It is common ground that Blain Baker is qualified to work in that trade. On March 20th he was on a one-week training program to which he had been sent by Siteco and for which Siteco was paying him his normal wages. The purpose of the training was to upgrade Baker’s knowledge of the design, installation, and repair of programmable logic control (“PLC”) systems. The work which Baker does for Siteco involves PLC systems on equipment which Siteco installs in the mining industry. Counsel for the respondents asserts, and it is not disputed, that the installation of such equipment is work in the construction industry. Counsel submits that, when an employer such as Siteco assigns an electrician or apprentice electrician to a training program to upgrade his skills required for the construction work on which he is employed and pays his regular wages, the employee is employed in the construction industry and in the bargaining unit. On that basis, counsel argues, Baker was at work in the bargaining unit on the application date.

7. The Board has reviewed counsel’s full submissions made in support of that proposition and it respectfully disagrees. The main reason why the Board focuses on the date of application in construction industry applications for certification when determining which employees are to be counted in the unit is for certainty in an employment environment which is inherently transitory. That same need for certainty is why the Board requires that an employee be at work on the application date as compared to being simply an employee. The Board has consistently applied the term “at work” to mean physically performing the work of the bargaining unit. The parties to an application for certification benefit from these rules because they reduce the uncertainty about which employees will be counted as being in the unit and they assist the expeditious resolution of applications for certification. See the discussion in *Al Gordon Electric Limited*, [1990] OLRB Rep. June 637, at paragraphs 12 through 20. An employee who is on a training course which has no physical connection with the work being performed by employees in the bargaining unit on the application date cannot be said to be “at work” in the unit even if the training being taken does have direct application to that work. Therefore, the Board finds that Blain Baker was not at work in the bargaining unit on March 20th and is not to be included on the list of employees for purposes of the count made by the Board pursuant to subsection 7(1) of the Act.

8. Michael Therrien, Dan Laforest and Bernard Monderie were employed by Leo Alarie and Sons Limited on the date of making of the application. Each of them was at work on premises owned by Alarie and used for the conduct of its business. Therrien and Laforest were running wire for light fixtures and installing the fixtures in two, new extensions to the shop part of the premises. Monderie was doing similar work in new offices. He was running new wiring, including wiring for the computer systems, installing electrical receptacles and fixtures. Therrien and Monderie were occupied all day on March 20th with this work, and Laforest spent the majority of the day on it.

Counsel for the respondents acknowledges that none of them is an apprentice electrician or qualified to work in the compulsory, certified trade of electrician.

9. When the Board is discharging its mandate under subsection 7(1) of the Act to “... ascertain the number of employees in the bargaining unit at the time the application was made ...” where the unit is confined to a compulsory, certified trade, it does not include in the unit any person who is not qualified pursuant to the requirements of the *Trades Act* to work in the trade even though the person may have been performing the work of the trade. In that respect, the Board looks to the *Trades Act* as a guide to deciding whether a person is employed in the trade in question and is to be “counted” in a bargaining unit confined to that trade. See *O. J. Pipelines Incorporated*, [1989] OLRB Rep. Sept. 976.

10. Counsel submits that Therrien, Laforest and Monderie were at work in the proposed bargaining unit on the date of making of the application and should be included on the list of employees even though they are not qualified pursuant to the *Trades Act* to work in the electrician trade. This is because they were employed by Alarie on the application date and spent the majority of their time on that date performing bargaining unit work and were lawfully employed on that work. Counsel argues that the work which they were performing for Alarie was work coming within the definition of industrial electrician in Section 1(a) of Regulation 718/86 of the *Trades Act*. It was also work coming within the definition of the compulsory, certified trade of electrician in section 1(b)(i) of Regulation 32 of the *Trades Act*. Since the trade of industrial electrician is a voluntary, certified trade, persons working in that trade are exempt from the prohibitions of subsection 11(2) of the *Trades Act* and may lawfully work in the trade without being a qualified journeyman electrician or registered apprentice electrician. In that respect, counsel relies on the legal analysis in *C T Windows Limited*, [1983] OLRB Rep. May 627 at paragraphs 7 to 9. Furthermore, even though the work which they were performing was also work of the compulsory, certified trade of electrician, they were lawfully performing that work because it was limited purpose work in the industrial electrician trade being performed for Alarie on its own premises. In those circumstances, counsel argues, they do not have to be qualified journeymen electricians or registered apprentice electricians to perform the work because section 1 of Regulation 32 states that the definition of electrician under that regulation does not include “... a person who is permanently employed in an industrial plant at a limited purpose occupation in the electrical trade.”.

11. Accordingly, counsel submits that Therrien, Laforest and Monderie were employed for the limited purpose of the industrial electrician trade performing work of the compulsory, certified trade for which the applicant is seeking to be certified. They were employed on that work by Alarie on its own construction site and, therefore, lawfully employed pursuant to the *Trades Act* according to the Board’s analysis at paragraph 9 of *C T Windows*, *supra*. The work which they were doing was construction work falling within the trade of industrial electrician. Since it is also work which falls within the definition of electrician under Regulation 32, it is work of the bargaining unit for which the applicant is seeking certification. Therefore, as at the date of making of the application for certification, they were employees of the respondent lawfully performing work of the electrical trade and, pursuant to the principles expressed in *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; *P & M Electric (1982) Ltd.*, [1989] OLRB Rep. June 638 and *B.C. Meck*, [1988] OLRB Rep. June 546, must be included in the bargaining unit.

12. It is unnecessary for the Board to decide whether respondent counsel’s analysis of the *Trades Act* and its Regulations 32 and 718/86 is correct and that Therrien, Laforest and Monderie were lawfully performing the work of the bargaining unit on the date of making of the application. This is because the Board would still not include them on the list of employees who would be in a bargaining unit confined to the compulsory, certified trade of electrician which the applicant pro-

poses to be a unit of the respondents' employees appropriate for collective bargaining. As the Board pointed out in *P & M Electric, supra*,

"... it would make no labour relations sense to include in a construction industry bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings under the *Labour Relations Act*, persons who cannot lawfully work in the bargaining unit before or after certification and who share no real community of interest with electricians who are entitled to work in that trade pursuant to the [*Trades Qualification Act*]".

Even if Therrien, Laforest and Monderie were lawfully performing work of the electrician trade on the application date, unlike the other employees who were at work in the unit on that date and were journeymen or apprentices in the electrician trade, they would not be able to lawfully perform work of that trade on construction sites for the respondents' clients. They would be limited to performing such work on the respondents' premises. In those circumstances, they would share no real community of interest with the journeymen and apprentice electricians who are not so limited and would be included in the unit. Therefore, whether or not Michael Therrien, Dan Laforest and Bernard Monderie were lawfully at work on March 20th in the proposed bargaining unit, they are not to be included on the list of employees for purposes of the count to be made by the Board pursuant to subsection 7(1) of the Act. For similar reasons, and having regard to the agreement of the parties, John Milroy would not be included on the list.

13. In summary the Board has:

- (1) declared that Siteco Electric Ltd. and Leo Alarie and Sons Limited are to be treated as constituting one employer for purposes of the *Labour Relations Act*; and,
- (2) found that John Milroy, Ray Kensley, Blain Baker, Michael Therrien, Dan Laforest and Bernard Monderie are not on the list of employees who would be included in the bargaining unit for purposes of the count to be made by the Board pursuant to subsection 7(1) of the *Labour Relations Act*.

14. In the result, the Registrar is directed to list this application for continuation of hearing for the purpose of receiving the evidence and representations of the parties respecting:

- (1) whether Shawn Burrows was at work in the bargaining unit on March 20, 1990;
- (2) whether the intervener already holds the exclusive bargaining rights which the applicant is seeking in all sectors of the construction industry, *excluding the ICI sector*, in the Board's geographic areas 19, 21 and 22 and within a radius of 100 kilometres of Kapuskasing, Ontario;
- (3) whether the Board ought to rely on the applicant's membership evidence; and,
- (4) any other matters arising out of or incidental to the application.

In order to assist the Registrar in the scheduling of the application for continuation of hearing, the parties are directed to provide the Registrar with their estimate of the number of days required for the hearing and their available dates to June 30, 1992. This information is to be supplied to the

Registrar within 14 days of the date of this decision. The Registrar may schedule the hearing on such dates as she considers appropriate, without further consultation, should the parties, or any of them, fail to provide her with the information as directed.

0626-90-R; 1678-90-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto, Applicant v. **TheatreCorp Ltd.**, and WGC Facility Management Corporation, Respondents; International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto, Applicant v. TheatreCorp Ltd., WGC Facility Management Corporation and Theatremark Ltd., Respondents

Certification - Employer - Related Employer - First respondent operating theatre complex under agreement with complex owner - Other respondents, amongst others, using complex under licence for producing or presenting theatrical productions - Respondents under common control or direction - Respondents asserting that they carry on businesses separately but in a related enterprise - Common employer declaration issuing - Board, however, finding the “producer” rather than “the house” to be the employer of the stagehands dispatched from the union’s hiring hall - Board determining that for purposes of “the count” in this industry, the employee complement is that which exists on the application date - As there were no employees of the named respondents at work in the bargaining unit at the time the application was made, certification application dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. A. Rundle* and *C. McDonald*.

APPEARANCES: *Thomas W. G. Pratt* for the applicant; *John S. Kelly* for the respondents.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR, AND BOARD MEMBER J. A. RUNDLE;
March 13, 1992

1. The style of cause is hereby amended to reflect the correct name of the respondent: “WGC Facility Management Corporation”.
2. Board File No. 1678-90-R is an application filed pursuant to section 1(4) of the Labour Relations Act (“the Act”) in which the applicant (“IATSE” or “the union”) seeks a declaration that the respondents constitute a single employer for purposes of the Act. Board File No. 0626-90-R is an application for certification in which IATSE seeks to be certified as bargaining agent of certain employees of the respondents. For ease of reference those employees will be referred to throughout as stagehands as IATSE seeks to represent only its “standard” craft unit of stagehands. The applications are related and the parties agreed that the matters be heard together. It was agreed that the evidence heard by the Board during the course of the hearing and contained in a report prepared by the Labour Relations Officer appointed to inquire into the employment status of certain persons be applied and considered by the Board in its decision in both these applications.
3. A number of matters were agreed upon by the parties. The primary issue in dispute which is central to both applications revolves around the question “who is the employer of the

stagehands?" We note at the outset that the position of the respondents that the stagehands were not "employees" but were independent contractors was not pursued in the respondents' final submissions to the Board.

4. It is not disputed that WGC Facility Management Corporation ("WGC"), Theatrecorp Ltd. ("Theatrecorp") and Theatremark Ltd. ("Theatremark") are under common control or direction. The respondents submit however that they do not carry on associated or related activities or businesses and assert instead that they carry on businesses separately but in a related enterprise.

FACTS

5. The Ontario Heritage Foundation ("O.H.F.") owns the premises at 189 Yonge Street, Toronto, Ontario, known as the Elgin and Winter Garden Theatre complex ("the complex"). The building is an historical site which contains two theatres called respectively the Elgin Theatre and the Winter Garden Theatre. The Elgin Theatre is a 1005 seat facility while the Winter Garden Theatre has 991 seats.

6. By an agreement in writing dated November 21, 1988 the O.H.F. granted to WGC a licence to use and to authorize other persons to use the complex to present theatrical productions and concerts; motion picture films; the operation of dining lounges and the like; the exhibition of items of interest in the areas of history, architecture etc.; non-profit cultural and community events; meetings, seminars, classes and industrial shows and reception; and related administrative functions. For ease of reference this wide variety of uses will hereinafter be referred to as a "theatrical production".

7. WGC operates the complex. In so doing it employs a variety of people including bartenders, office personnel, maintenance personnel, box office personnel, theatre ushers etc. WGC has never itself engaged in producing or presenting a theatrical production. Rather WGC grants licences or leases to other entities to use the complex for producing or presenting theatrical productions. Two of the entities to whom WGC has leased the complex are Theatrecorp and Theatremark. The majority of time however WGC licences the premises to third parties with whom it does not share common direction or control.

8. Both Theatremark and Theatrecorp are entities which on occasion produce and/or present theatrical productions. A "presentation" of a theatrical production is a circumstance where Theatremark or Theatrecorp "buys" a complete theatrical production (including for example director, stage manager, company manager, actors etc.) and presents the production at a particular venue such as the complex. Where Theatremark or Theatrecorp "produces" a theatrical production it is the originator of the production at that venue and as such is responsible for hiring the actors, directors, stage managers etc. necessary to put on the production.

9. In addition to its business as producer or presenter of theatrical productions Theatrecorp also provides "technical services" to WGC. By an agreement in writing dated April 12th, 1990 WGC retained the services of Theatrecorp to "provide and/or co-ordinate all technical services (as commonly understood within the theatrical industry) for the purpose of protecting all areas from persons unfamiliar with the complex". In exchange for a monthly payment of \$1,000.00 Theatrecorp provides to WGC the following services:

- 1) All production and technical services for the COMPLEX as they relate to the requirements for productions and/or presentations taking place within the COMPLEX

- 2) All arranging or coordination of the providing of labour required to perform the functions as outlined in #1 above
- 3) All payroll functions (including but not limited to payment, processing, workers' compensation insurance, deductions, benefits etc.) required to remunerate any and all labour retained by THEATRECORP to perform any of its obligations under this agreement
- 4) The services of Miss Sandra Robinson as liaison and coordinator between WGC and THEATRECORP

The agreement further states that WGC will:

- 1) Reimburse THEATRECORP for any and all disbursements made on behalf of WGC in the performance of the functions outlined above
- 2) Withhold a sufficient amount of funds from box office receipts sold on behalf of Licensees of the COMPLEX in order to reimburse THEATRECORP for costs paid on behalf of such Licensees
- 3) Provide THEATRECORP with office space, a telephone and such other office equipment as may be required to carry out its tasks.

10. The Ms. Robinson referred to in the agreement between TheatreCorp and WGC characterizes herself as an independent contractor. She has entered into a written contract dated December 1, 1989 with TheatreCorp to provide the following services:

- 1) Production management services to THEATRECORP for any and all presentations produced and/or presented by THEATRECORP within the COMPLEX
- 2) Production management coordination and/or assistance to Licensees within the COMPLEX for any and all presentations produced and/or presented by such Licensees
- 3) Supervision and/or coordination of all technical services within the COMPLEX in order to protect the COMPLEX from unauthorized persons performing any technical services within the COMPLEX

Ms. Robinson invoices TheatreCorp and is paid a weekly amount.

11. It is helpful to examine Ms. Robinson's various roles and duties in order to understand the relationship amongst the respondents and their relationship with third party users at the complex.

12. Where a third party user has licensed the complex from WGC to a producer presenting a theatrical production, Ms. Robinson meets with representatives of the third party to review with the licensee their technical requirements for the theatrical production. She assists and advises the licensee in ascertaining those technical requirements, advises the licensee about the equipment available for use at the complex, advises about any restrictions in the use of that equipment or the complex, and ultimately assists in preparing the licensing agreement and appropriate documentation entered into between WGC as licensor and the licensee.

13. Where Theatremark or TheatreCorp produces or presents a theatrical production at the complex, it enters into a standard form licensing agreement with WGC. It is then the licensee of the complex. In that instance Ms. Robinson is responsible for making all arrangements relating to the technical requirements of the production. She arranges for any contracts for services relating to those technical requirements, and directs and supervises the persons who provide those services including the stagehands whom IATSE traditionally represents in collective bargaining.

14. As the agreement between TheatreCorp and WGC indicates, TheatreCorp also performs certain payroll functions. These payroll functions are provided by TheatreCorp to licensees of the complex. The reasons for the provision of this service are twofold. First, the service is provided to assist licensees of the complex. Licensees of the complex are generally itinerant. The licensee uses the facility for a relatively short period of time to produce or present the theatrical production and then moves on. Other licensees are small and/or non-profit organizations. As a result many of the users of the complex do not have banking and other accounting capabilities in Toronto which the licensee can draw upon while engaged in a theatrical production at the complex. Secondly, and of equal importance however is the fact that payroll services are provided to licensees of the complex at the request of IATSE. In this instance Mr. Fuller, the president of IATSE Local 58 requested the principals of WGC, Theatremark and TheatreCorp that payroll services be provided to licensees of the complex. Given the many and varied licensees who use the facility, IATSE does not want to deal with or attempt to recover salary and benefits from individual itinerant producers or presenters of theatrical productions when it sends its members from the hiring hall to work at the complex. Rather IATSE has insisted that the complex be responsible for paying the stagehands and performing the role of paymaster of wages and benefits. In this instance that responsibility is borne by TheatreCorp.

15. Payroll services such as the one provided by TheatreCorp to licensees of the complex are common in the industry for these same reasons. The venue at which a theatrical production is presented or produced typically provides payroll services to licensees. In this instance that industry practice could result for example in persons engaged in a Theatremark produced theatrical production at the Elgin Theatre receiving cheques from TheatreCorp, while persons engaged in a Theatremark produced theatrical production at Massey Hall, the O'Keefe Centre or the Royal Alexandra Theatre would receive their cheque from the appropriate entity which provides payroll services at those venues. Many producers or presenters of theatrical productions will not lease facilities unless payroll services of this nature are provided for in the licence agreement with the owner/operators of the theatrical complex.

16. The provision of the payroll service is referred to and agreed upon in the licensing agreement between WGC as licensor and the licensees (including Theatremark) who make use of the complex. The system used is relatively simple. The number of hours worked by persons employed in the theatrical production is entered on sheets and sent off to a computer payroll service (in this case operated by the Toronto Dominion Bank). Cheques are issued by TheatreCorp. Deductions for CPP, Income Tax etc. are made from the cheques. An invoice representing the total amount of the earnings and benefits paid on behalf of IATSE members is sent by TheatreCorp to the licensee. The invoice will specify the amount of money withheld by WGC from the box office receipts. WGC pays the box office receipts it has withheld to TheatreCorp. Any balance outstanding after receipt of such box office funds are recovered directly from the licensee by TheatreCorp. TheatreCorp pays to IATSE the amount due for health and other benefits.

17. We note that since WGC has held the exclusive license to the complex as a rule licensees using the complex have used persons sent from the IATSE hiring hall to perform the stagehand functions associated with their use of the complex. The exceptions to this rule have been rare

and the stagehands working at the complex are typically IATSE members. Pursuant to what the parties agreed was a “without prejudice agreement” with IATSE a tariff of rates to be paid to IATSE members working at the complex was fixed. The Board heard no evidence about the terms of that agreement or its negotiations.

18. Having outlined in general terms the businesses and activities of the respondent and Ms. Robinson we turn now to examine the specific facts and circumstances applicable to these applications.

19. IATSE filed this application for certification on June 25th, 1990. The application pursuant to section 1(4) of the Act was filed on September 27th, 1990. During the months of June and July a number of theatrical productions and events each of which required the use of stagehands took place at the complex. In abbreviated form these included:

- (a) the Renaissance Theatre Company production of two theatrical productions entitled “A Mid-Summer Nights Dream” and “King Lear” (this theatrical production was “presented” by Theatremark);
- (b) a CTV sales presentation;
- (c) a photography session by the O.H.F. requiring the set up to specifications of the Elgin and Winter Garden Theatres by stagehands;
- (d) the Steven Wright Concert/HBO taping;
- (e) a theatrical production entitled “Love Letters” (presented by Theatremark);
- (f) the Dora Mavor Moore Awards (presented by the Performing Arts Information Service); and
- (g) the DuMaurier jazz festival.

20. On June 25th, 1990 the date on which the certification application was filed the complex was used for a theatrical production entitled “The Dora Mavor Moore Awards” (the Doras). The Doras were presented and produced by the Performing Arts Information Service (“PAIS”) an organization affiliated with the Toronto Theatre Alliance. It is a non-profit organization whose primary objective is to stimulate awareness in theatrical activities in the Toronto area. One way PAIS achieves this is through the presentation of the Doras. The Doras is a yearly celebratory evening of the theatrical community and includes the presentations of awards with respect to theatrical activities in Toronto in the preceding year. In the past the Doras have been presented at the complex, the Royal Alexandra Theatre, and the St. Lawrence Centre for the Arts.

21. On June 18th, 1990 PAIS entered into a standard licensing agreement with WGC for the use of the complex on June 25th, 1990. The agreement specifies that the licensee PAIS may use specified parts of the complex for “take-in” Friday, June 22nd, 1990 from 8:00 a.m. to 11:00 p.m., rehearsals from 8:00 a.m. to 5:00 p.m. on Monday, June 25th, 1990, the performance itself commencing at 8:00 p.m. on Monday, June 25th, 1990, and the “take-out” on Tuesday, June 26th, 1990 from 8:00 a.m. to 12:00 p.m. The term “take-in” refers to the set up of the necessary props, scenery, lighting equipment, audio equipment etc. prior to the show. Conversely the term “take-out” refers to the dismantling of those items.

22. The producer of the Doras was Ms. Catherine McKeehan. Ms. McKeehan is an inde-

pendent theatrical producer who has worked within the theatre industry for more than thirty years. She had been engaged by PAIS to produce this event. Ms. McKeehan had been involved in the presentation of the Doras in past years. Before producing the show in June, 1990, Ms. McKeehan discussed the nature of the show and its technical requirements with Ms. Robinson.

23. Prior to the 1990 Doras Ms. McKeehan met with Mr. Fuller in the same manner she had done in the past years. Ms. McKeehan advised Mr. Fuller the awards were coming up and that IATSE would, as usual, participate in the event. Ms. McKeehan specifically indicated to Mr. Fuller that IATSE members would be used on the show. There apparently had been some suggestion that IATSE union members would not be working the show. Having advised Mr. Fuller of the use of IATSE members she requested any consideration that could be given in light of the nature of the event.

24. There was some discussion between Mr. Fuller and Ms. McKeehan as to the possibility of using the lighting and sound equipment of the theatrical production scheduled for the complex at around the same time as the Doras. Ms. McKeehan questioned Mr. Fuller as to whether the Doras would have a separate IATSE crew or whether the Doras would/could use the same stagehands working the other theatrical production.

25. Ms. McKeehan did not specifically discuss with Mr. Fuller the rates of pay for IATSE members. She was aware of the rates paid to IATSE members who worked at the complex. Her past experience with Mr. Fuller had indicated that those rates were not negotiable - not even for the Doras. Save for the schedule of hours Ms. McKeehan did not discuss any other working conditions with Mr. Fuller as she "wouldn't have thought it necessary". Ms. McKeehan did not discuss with Mr. Fuller the number of persons required for the show leaving those matters to Mr. McKay the production manager. She did discuss with Mr. Fuller IATSE's monetary contribution to the Doras and its sponsorship of an award. Ms. McKeehan also discussed a separate contribution to be made by Canadian Stage and Projects Limited, a company owned by Mr. Fuller which rents lighting and equipment to various theatres.

26. Ms. McKeehan testified that the stagehands who worked on the Doras were not paid directly by the PAIS in 1990 or in any of the preceding years. Rather payment to the stagehands had always gone through "the management of the theatre" via the payroll service of the various theatrical venues at which the Doras had been produced. Similarly in 1990 the Doras used Theatre-corp's payroll services. It is evident that had a payroll service not been available to PAIS a different venue for the Doras would have been chosen.

27. The production manager of the Doras was Kent McKay. Mr. McKay is regularly employed as the production manager for Ainsworth Electric at the Sky Dome in Toronto. As production manager of the Doras it was Mr. McKay's responsibility to use the drawings or plans of the designers (including for example the lighting and set designs) and transform those designs onto the stage. He therefore worked and has always worked closely with stagehands and IATSE members from the union's hiring hall.

28. Prior to 1990 Doras Mr. McKay consulted with Ms. Robinson about the size of the crew required for the Doras. Mr. McKay testified "... I ultimately decided (the size of the crew) based on that consultation, the plans and what I knew was required". Having determined the size of the crew Mr. McKay provided Ms. Robinson with a list detailing among other items the number and classification of stagehands required for the show, and the hours of work.

29. Mr. McKay consulted with Ms. Robinson because "from a practical point of view I see it as Sandy's (Robinson) venue". Mr. McKay considered Ms. Robinson to be more familiar with

the “idiosyncrasies” of the theatre complex including the ease or difficulty of rigging certain lighting designs, scenery etc. As an example, Mr. McKay testified that Ms. Robinson advised that the theatre’s fly system (the space above the stage for storing and operating scenery, lights, etc.) required two persons. Ms. Robinson was there to help and assist with such technical services and Mr. McKay took full advantage of her knowledge and expertise in this area.

30. Ms. Robinson and Mr. McKay discussed who would place the call to IATSE’s hiring hall requesting that members be sent to the complex. It was agreed that Ms. Robinson would place the call. Ms. Robinson testified that generally after the users or licensees of the complex have given her the required information she contacts the business agent of the union to advise them of the call for members. Mr. McKay testified that he considered having Ms. Robinson make the call to the union to be a matter of “professional courtesy” as the complex was “her house”.

31. On June 22nd Mr. McKay met with Ms. Robinson at the complex. Ms. Robinson showed Mr. McKay around the facility and introduced him to the department heads who had been sent out from the hiring hall. Some explanations and information about the use of the facility and its physical limitations was provided by Ms. Robinson. Thereafter she left and had no further contact with the stagehands who worked on the Doras.

32. Neither Ms. Robinson nor any employee of WGC, Theatrecorp or Theatremark gave any instruction, or direction to the stagehands who worked at the complex on the production and presentation of the Doras. Neither Ms. Robinson nor any employee of any of the respondents supervised the work, disciplined employees nor determined when employees were no longer required. All direction and supervision of stagehands working on the Doras was done by representatives of PAIS and in particular Mr. McKay.

33. After the presentation of the Doras and the take-out Theatrecorp paid the stagehands who worked on the show. The total amount of wages and benefits incurred for stagehand labour was back charged to PAIS pursuant to the terms of its license with WGC and WGC’s agreement with Theatrecorp. A portion of the total owing was paid to Theatrecorp by WGC from the box office receipts for the performance. Thereafter PAIS paid Theatrecorp directly the outstanding balance owed.

34. It is relevant to compare and contrast the terms and conditions of employment of the stagehands who worked on the Doras with those of the stagehands who worked on other theatrical performances (including those presented or produced by Theatremark) at the complex.

35. The method by which stagehands arrived at the complex to work on the Doras was the same as in the past. Ms. Robinson called the union hiring hall requesting that persons attend at the complex on a particular day. If Theatrecorp or Theatremark is producing or presenting the theatrical production Ms. Robinson makes the call requesting members on behalf of each of those companies. Where Theatrecorp or Theatremark is producing or presenting the theatrical production it is Ms. Robinson who determines the number of IATSE members required and their hours of work. In so doing she may on occasion consult with others employed or contractually engaged in the theatrical production.

36. If a third party licensee is producing or presenting the theatrical production Ms. Robinson places the call to the hall on behalf of such third party licensee. In that instance however Ms. Robinson acts merely as a conduit of information from the licensee to IATSE. On the evidence before us we have concluded that in these circumstances IATSE knows that Ms. Robinson’s role is limited to that of a conduit. For example on May 24, 1990, at the request of IATSE Ms. Robinson provided the union with a schedule of events at the complex from May 30th to June 30th, 1990.

The schedule states it "is based on information currently available from the licensees. It is subject to change/addition as more information becomes available.". The schedule further states what *the licensees'* estimates are for their respective productions. Thus for example a reference to the OHF photography session states "R. Smerdon to supervise for O.H.F. - estimates 4 men for 5 hours". The schedule Ms. Robinson sent to IATSE has attached to it the production schedule prepared by CTV with respect to its sales presentation and states "see their scheduled attached. Their Production Manager has advised that she will be bringing me a revised version ... I will fax to you when I have it.". Thus where a third party licensee is using the complex Ms. Robinson is merely a conduit of the decisions made by the licensee (perhaps after consultation with Ms. Robinson) about the number of IATSE members required and their hours of work.

37. Where Theatrecorp or Theatremark produces a theatrical production it is Ms. Robinson who supervises and directs the stagehands. Where Theatrecorp or Theatremark presents the theatrical production it is Ms. Robinson and/or any other technical personnel engaged by the Corporation for that production (i.e. a stage manager who "comes with the show") who supervises and directs stagehands. On the other hand where a third party licensee produces or presents a theatrical production at the complex, the technical personnel of the licensee directs and supervises the stagehands. In this latter instance Ms. Robinson's role is limited to introducing such technical personnel to the "heads" of the departments ("heads" are generally designated by the union) and where necessary ensuring that the physical integrity of the complex is not compromised by the licensee.

38. In fact the stagehands require little supervision. As skilled qualified and "professional" members of their craft the members are generally merely directed to the type of work required to be performed. In addition, although IATSE members may be dispatched by the hall to a number of different theatrical complexes within the local's jurisdiction throughout the year, those members who are regularly or frequently dispatched to a particular location develop a pride about "their house". As skilled technicians who regularly work at a particular venue on many different productions they know by experience and training generally what needs to be done. Where Theatrecorp or Theatremark is the licensee of the complex however Ms. Robinson directs the stagehands to the specific type of work required or what specifically needs to be done. Where another licensee uses the complex it is the representative of such licensee who directs the stagehands about what specifically needs to be done or the specific work required.

39. Some of the "traditional" aspects of the employer/employee relationship such as the appointment of "lead hands" or "working supervisors" and the imposition of discipline are not present when IATSE members are engaged. This is so whether WGC licenses the complex to a third party licensee or to one of the other respondents. Thus for example it is generally the union which determines who will be the department head(s) during a theatrical production, not the producer or presenter of the production. Similarly matters of discipline of employees are generally dealt with internally by the union through the head or union steward on site. The producer or presenters role in disciplining stagehands appears to be limited to informing IATSE, the department head and/or the steward of any problem.

40. All time sheets for stagehands working at the complex are provided to Ms. Robinson by the department heads regardless of the identity of the licensee of the complex. Ms. Robinson checks the time sheets against the information and schedule she has about the number of stagehands and their hours of work required for the theatrical production. Where a third party licensee is the producer or presenter of the theatrical production, and there is a discrepancy between the hours on the time sheets and the information provided to Ms. Robinson about the hours to be

worked, Ms. Robinson investigates the discrepancy with the licensee and the head of the crew involved. Ultimately Ms. Robinson forwards the time sheets to WGC.

41. Pursuant to the payroll services of TheatreCorp the stagehands receive a single cheque from TheatreCorp for all work done at the complex in any particular week. This notwithstanding the fact that TheatreCorp may back charge one or more licensees of the complex for the monies paid to the stagehands. Thus on the application date a portion of wages and benefits owing to W. Culley was back charged to Theatremark, the company which presented the "Renaissance Theatre" theatrical production at the Elgin Theatre in June 1990 for the completion of the take-out of that production. The remainder was back charged to the PAIS for work on the Doras. Similarly, of the 26 IATSE members at the complex on June 22nd the day of the Dora take-in, the bill for wages and benefits worked by seventeen of these persons was back charged by TheatreCorp to the PAIS for the Doras. The bill for wages and benefits of the other nine persons was back charged by TheatreCorp to DuMaurier Limited Downtown Jazz, a licensee which had entered into the standard licensing agreement with WGC to present a jazz festival performance on June 22nd, 1990. On June 26th, the day of the take-out 22 IATSE members worked at the complex. The wages and benefits of eight of these persons was back charged by TheatreCorp to PAIS for the take-out of the Doras. The wages and benefits paid to the other fourteen persons were back charged by TheatreCorp to Theatremark for the take-out of the Renaissance Theatre. Stagehands however receive one cheque from TheatreCorp from which all standard deductions for income tax, CPP etc. are made. At the end of the year T4 tax statements are issued by TheatreCorp to stagehands who have worked at the complex during the year.

42. Health and pension benefits for the stagehands are provided under the auspices of the union. TheatreCorp remits a percentage of the total funds paid to the stagehands to the union hiring hall for the provision of these benefits. These are also back charged to the licensee of the complex.

43. It would appear that the stagehands' view the venue at which they work as their employer. Thus in this instance when asked for whom they worked the member answered "the Elgin Theatre" or "the Elgin Winter Garden Theatre". Similarly, when asked about previous employment the stagehands indicated that they worked for Massey Hall, the O'Keefe Centre, the Royal Alexandra Theatre etc.

44. The stagehands are aware that they are paid pursuant to a payroll service and that ultimately the money for their wages and benefits comes from the producer or presenter of the theatrical production.

THE SINGLE EMPLOYER DECLARATION

45. There are three conditions which must exist before a common employer declaration can be made pursuant to the Board's authority under section 1(4) of the Act. These are:

- (a) there must be more than one corporation, firm, individual association or syndicate involved;
- (b) these entities must be engaged in associated or related businesses or activities, whether or not simultaneously; and
- (c) these entities must be under common control or direction.

Even if these three conditions are present, the Board's authority to grant a common employer declaration is discretionary.

46. In this instance it is agreed that the three corporate respondents are under common direction and control. The respondents submit that they do not carry on associated or related activities or businesses. It is further argued that at the relevant time none of the respondents either alone or as a "single" employer pursuant to section 1(4) of the Act was the employer of the employees whom IATSE seeks to represent. Accordingly, the respondents submit that the Board exercise its discretion under section 1(4) and refuse to grant a single employer declaration.

47. We find that the three conditions precedent to the Board's authority to grant a single employer declaration exist. We find that the respondents are engaged in associated or related businesses or activities.

48. WGC's business is to run, operate and manage the theatre complex. That theatre complex is under the complete operational control of WGC. Pursuant to its licensing agreement with the O.H.F., WGC has certain duties, obligations and rights with respect to that complex. To assist it in performing its business, WGC has entered into a technical services contract with TheatreCorp. Payroll services to licensees of WGC are provided pursuant to that technical services contract. In order to provide the technical services TheatreCorp has in turn entered into contractual relations with Sandra Robinson. By reason of the contractual terms between WGC and TheatreCorp Ms. Robinson is to act as liaison and co-ordinator between the two entities. Through these various contractual relationships TheatreCorp is functionally integrated with the business activities of WGC. For its part, Theatremark is the corporate entity which produces or presents theatrical productions within the complex operated and managed by WGC. In the circumstances of this case Ms. Robinson's role and status as production supervisor or production manager of such productions is the link which in turn binds Theatremark to the other respondents and their contractual relations.

49. Mr. Rubinstein testified that if Ms. Robinson's services through TheatreCorp were not available WGC would not necessarily have provided the services she provides to the third party licensees. It was a "business choice we made to have [Ms. Robinson] on staff through TheatreCorp". As mere licensor of the complex WGC was not in the business of providing technical services to licensees.

50. The fact remains however that the "business choice" was made. As licensor of the complex WGC has chosen to provide certain theatre related services including box office services, bar services etc. It has also chosen to provide technical and production services and payroll services to its licensees through the auspices of TheatreCorp. Conversely WGC makes provisions with its licensee that the box office receipts it collects on behalf of the licensee can be used to pay any charges owing to TheatreCorp for expenses which TheatreCorp has incurred in the supply and co-ordination of technical services to the stage areas of the theatrical complex.

51. In determining whether to exercise our discretion, we find it useful to refer to the oft-quoted decision of the Board in *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029 where the Board addressed the purpose of section 1(4) and stated at paragraphs 9 to 13:

9. Section 1(4) is obviously contemplated to cure the mischief [sic] that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

10. Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

11. Also, in some situations where a union had been granted bargaining rights for the employees of one employer the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

12. So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al*, [1971] OLRB Rep. 406.

13. It is in these types of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted.

52. A review of the numerous single employer decisions rendered by the Board since that time have identified the principles and legislative objectives which underline section 1(4). These may be conveniently summarized by stating that section 1(4) is designed:

- (a) to preserve or protect from erosion the bargaining rights of the union,
- (b) to create or preserve viable bargaining structures, and
- (c) to ensure direct dealings between a bargaining agent and the entity with real economic power over the employees.

53. Having regard to these principles and purposes we find that in the circumstances of this case the Board ought to exercise its discretion in favour of the applicant union and make the single employer declaration. In particular the Board's determination with respect to the certification application and concerns about the creation of viable bargaining structures can, and in this instance should be addressed through the common employer declaration. In this instance the separate work forces of the respondents are carrying on an integrated operation.

THE CERTIFICATION APPLICATION

54. The certification application raises directly the question who is the employer of the stagehands. *York Condominium*, [1977] OLRB Rep. Oct. 645 was cited for the factors to which the Board looks to determine who is the true employer of the stagehands. At page 648, paragraph 10 of that decision the various factors were succinctly summarized as follows:

- (1) The party exercising direction and control over the employees performing the work.
- (2) The party bearing the burden of remuneration.
- (3) The party imposing the discipline.

- (4) The party hiring the employees.
- (5) The party with the authority to dismiss the employees.
- (6) The party who is perceived to be the employer by the employees.
- (7) The existence of an intention to create the relationship of employer and employee.

55. As the case law indicates no one of the seven enumerated criteria is determinative in all cases. The weight to be attributed to the factors also cannot be assigned in a vacuum. Due regard must be given to the industry within which the persons are employed. In this case it is particularly important to assess the entire context within which all relevant circumstances must be viewed in order to determine "how the industry works".

56. We have heard substantial evidence from all of the witnesses about "how the industry works". Within the industry there are two constants. There is always a venue, "a house", and there is always a "producer" a person or entity which presents or produces a theatrical production at a venue. At times the venue itself may be the producer as was the case both before and after the application date in this case when Theatremark produced both the "the Renaissance Theatre" and later "Love Letters". In the circumstances before us, however, it is not disputed that the "the house" and "the producer" are two different entities. Indeed, in the case before us the parties have agreed that "at the time the application was made" (see section 7(1)) there were sixteen employees at work in the bargaining unit on a production produced by PAIS called the Doras. The parties have agreed that only the employee complement which existed on the application date constitutes the lists of employees in the bargaining unit at the time the application was made. That employee complement consisted of 16 persons at work on the Dora production. We must determine who is the employer of those employees.

57. The respondents have argued that they are not the employer of the employees IATSE seeks to represent. Counsel asserts that in answering the question as to who is the employer, there is a "fundamental difference" in the case where one of the respondents is the producer or presenter of a theatrical production at the complex, and the fact situation before us where an independent, third party lessee has leased the complex for the production or presentation of its theatrical production. He argued that had IATSE applied to be certified at a time when the respondent(s) were the lessees of the complex and producing or presenting the theatrical production at the complex his submissions would be "different". From the totality of his submissions it is evident that the respondents view the "producer" as the employer of the stagehands and the appropriate respondent in the certification application.

58. For its part IATSE asserts that the owner/operator of the complex is the employer of the stagehands. In this instance that owner/operator employer is the fully integrated single employer WGC/TheatreCorp/Theatremark. The three corporate entities together perform the various functions of the employer vis-a-vis the stagehand employees. The single employer declaration makes it unnecessary to determine with any greater degree of precision which entity amongst the three named respondents is the employer of the employees in question. It is sufficient to determine that the three entities which together comprise "the house" is the employer. Counsel submits that as the operator and licensor of the complex to third party users, "the house" provides a full range of services including the supply and employment of the stagehands and other technical services personnel (i.e. Ms. Robinson) required by such third party licensee for its theatrical production. In making his submissions counsel focused primarily on the written contents of various agreements and documents, the legal "form" of the evidence presented before us. The *viva voce* evidence however either contradicted or modified that legal form. In the circumstances we find it more appropri-

ate to focus on the substance of the various transactions and agreements rather than their legal form.

59. There are a number of competing policy considerations which alternatively favour either a finding that the “producer” is the employer of the stagehands or a finding that “the house” is the employer of the stagehands dispatched to it from the union’s hiring hall. These competing policy considerations were alluded to but were not addressed in any detail by either party.

60. From the applicant’s perspective it is extremely onerous to require it to seek to be certified for each theatrical production which may be produced or presented at the complex. Theatrical productions may last for periods of time which range from hours or days to months or even years. From the evidence before us with respect to TheatreCorp’s and TheatreMark’s own past history it is apparent that legal ownership and make-up of production companies may itself undergo several different transformations as new partnerships and entities are created to produce or present different theatrical productions. In these circumstances granting bargaining rights to the applicant union with respect to employees of a particular “producer” appears somewhat illusory and meaningless. The producer certified today may be gone tomorrow - never to return to the venue or perhaps to return in some other legal form. As a result, it is argued that within the industry only the venue, “the house”, is an enduring permanent factor. A constant which is easily identifiable within an industry in which both “producers” and those who work in relation to their productions are essentially transitory.

61. The labour relations policy considerations which mitigate finding “the house as employer” but favour a finding of “producer as employer” are equally sound. The Board does not certify unions for physical locations. It certifies unions to represent employees employed by an *employer*. In that context it makes little sense to find an entity which does not impact upon the employment or conditions of employment of a group of employees accountable for labour relations matters pertaining to that group of employees. To certify an entity which does not in fact for example exercise direction or control over the employees performing the work, or which does not discipline, dismiss or pay employees is equally illusory and meaningless. In bargaining IATSE would be required to negotiate with an entity which does not hire, discipline, or direct employees or which does not control the purse strings about those very conditions of employment. From a labour relations perspective there can be little merit to granting such certification.

62. We do not find it useful or appropriate to focus with any great particularity on the issue whether “the house” or “the producer” is the employer of stagehands. In the matter before us the producer was not named as respondent in either the certification application or the single employer application. In these circumstances therefore it is impossible and particularly inappropriate for us to determine whether another entity not party to these proceedings is the employer of the stagehands. Rather we must determine which entity, if any, between the ones put forward by the parties (whether alone or together as a single employer having regard to the common employer application) was the employer of the stagehands at the relevant time.

63. We turn therefore to apply the usual criteria which the Board looks to in making a determination which of various named entities, if any, is the employer. Before so doing however, we note parenthetically that in this case counsel for the respondents and some of the witnesses suggested that the union itself was or should be considered the employer of the stagehands. It acts as the provider of labour services to all users of the complex through its hiring hall. We reject such a suggestion. Hiring halls such as the one run by this applicant can provide an equitable and efficient means of distributing employment opportunities in an industry where positions are temporary and personnel needs fluctuate. In *Joe Portiss*, [1983] OLRB Rep. July 1160 the Board made the follow-

ing observations about the hiring hall system within the construction industry. We view the comments as equally applicable to the IATSE hiring hall.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvass numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than to the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is notably the case for labourers, it may engender a work force with greater experience and sophistication, which will also benefit the employer.

Hiring halls in an industry organized along craft lines can't be compared to and should not be equated with mere temporary employment agencies.

64. With reference to the exercise of direction and control over the employees we find that at the relevant time none of the respondents or their representatives exercised direction and control over the persons at work. Such direction and control as was required was provided by Mr. Kent McKay the production manager of the Doras who was the lessee's (PAIS) representative on site. The stagehands carried out his directions. He determined what specific tasks the stagehands were to perform. He also determined the hours of work including the start and finish of the work day. Mr. McKay exercised both "immediate control" over the employees in the sense of directing specific tasks, and "overriding control" in the sense of ensuring that all stagehand work required to be done on the production was done satisfactorily. After making appropriate introductions Ms. Robinson left. Neither she nor any other representative of the respondent retained any "overriding control" which permitted the respondents, for example, to direct stagehands to work at something other than the Doras (See for example *Toronto Arts Productions*, [1980] OLRB Rep. Oct. 1556). Where a third party licensee uses the complex Ms. Robinson's role is *at best* limited to acting as conduit for the licensor's (WGC) instructions respecting *only* the maintenance of the physical integrity of the building. Ms. Robinson liases with the licensee's personnel on that matter but does not direct, control or supervise the stagehands. The situation is of course quite different when Theatremark or TheatreCorp is a producer of the theatrical production and Ms. Robinson wears her "production supervisor" hat. At the relevant time however, and with respect to the 16 persons who the parties have agreed are in the bargaining unit, the fact of direction and control does not point to the respondents as the employer.

65. With respect to the criterion of the party bearing the burden of remuneration we find that, at first blush this factor points to TheatreCorp as the employer. It is TheatreCorp which issues cheques to the employees after making all the appropriate deductions from those cheques. It is TheatreCorp which makes the remittances to the union. Normally a significant factor in determining who is the employer is to focus on the party which actually pays the employees. In this case, however, the evidence is uncontradicted that TheatreCorp is a mere paymaster for the licensee of the complex, and it is the producer who ultimately bears the burden of remuneration. TheatreCorp is indemnified for the costs it has incurred through the box office receipts and, where necessary a direct charge to the licensee for any short fall between expenditures incurred and box office receipts recovered. The labour costs appear to be borne primarily by the charge through ticket sales. The Board has consistently found that mere administrative paymaster arrangements are not indicative of the true employer. (See for example *Templet Services*, [1974] OLRB Rep. Sept. 606;

Ralston Purina Canada Inc., [1979] OLRB Rep. June 552; *Province of Ontario Board of Internal Economy*, [1980] OLRB Rep. Jan. 88; *Alwell Forming Limited*, [1978] OLRB Rep. Aug. 709; *Toronto Arts Productions*, [1980] OLRB Rep. Oct. 1556).

66. Moreover the evidence before us goes even further. Within the industry itself paymaster services are well established and common. More importantly both IATSE and its individual members know that such paymaster services are typically provided by the complex. Indeed the paymaster service itself was instituted at the request of the union. There is no evidence before us from which we can determine what the result would be if stagehands were not in fact paid for work done at the complex - whether the stagehands and IATSE would seek to recover wages and benefits from the complex or the producer. The *viva voce* evidence from all of the witnesses including the stagehands does establish however that the stagehands at work and IATSE itself knew of the artificiality of Theatrecorp as the payer of wages and benefits. Both IATSE and its members recognize that all wages and benefits would be charged back to the licensee of the complex.

67. In these circumstances we find that the criterion of the party bearing the burden of remuneration also does not necessarily or standing alone point to the respondents or any of them as the employer of the stagehands.

68. With respect to the third and fifth criteria relating to discipline and discharge, the evidence discloses that had it been necessary to discipline any person Ms. Robinson and/or Mr. McKay would refer the matter to the union and its on-site representative. Similarly had circumstances warranted the drastic step of discharge it is clear that the matter would first have been brought to the union's attention. In turn the union would handle the matter and "police its own". From the stagehand's perspective, when problems arose the stagehand would first go to the personnel associated with "the show".

69. With respect to the factor as to "the party hiring the employees" we find that although Ms. Robinson placed the call to the union hiring hall she was merely a conduit for the instructions of the producer. It was Mr. McKay and Ms. McKeehan who determined the size of the crew and hired the employees. Moreover, the totality of the evidence demonstrates that at all times the union which dispatched its members to the complex knew that Ms. Robinson was acting merely as a conduit and relaying information which had been provided to her by the licensee of the complex. In light of Ms. McKeehan's conversation with Mr. Fuller and having regard to the nature of the industry and the use of the hiring hall we find that the criterion of the hiring of the employees does not point to the respondents as the employer of the stagehands. With respect to the hourly rates paid to members working at the complex we find that on the application date the role of the respondents in that matter was limited to providing PAIS with the IATSE tariff or rates charged when members were dispatched from the hall to the complex.

70. The employees at work on the application date tended to refer to the complex, the Elgin Theatre, as their employer. The stagehands also stated however that they were working *at* the complex *for* a producer or presenter of the theatrical production. One of the stagehand witnesses for example testified about working for the principals of the respondents at Massey Hall on the "Cats" production road show. The perception of the employees in these circumstances is therefore an inconclusive factor and does not unequivocally point to any particular entity as the employer.

71. With respect to the final criterion we find that there was no intention to create the relationship of employer and employee by the respondents in any theatrical production which was not presented or produced by the respondents. At the relevant time therefore this factor points to another entity and not the respondents as the employer.

72. The seven criteria point in different directions. On balance however and having particular regard to the direction, control and supervision of the stagehands on the list agreed to by the parties we find that the respondents were not the employer of the employees at the time of the production of the Doras which led to this application.

73. We find it appropriate to make reference to two matters ancillary to these applications. First, in this case the parties focused their attention and submissions upon the sixteen employees at work on the application date. In so doing the parties recognized the special problems posed by the employment of stagehands within the theatrical industry. Employment within the industry is necessarily transitory. Stagehands are generally dispatched from the union hall to different venues within the union's jurisdiction. At any particular venue members may quite literally be here today and gone tomorrow. Theatrical productions at any particular location may last for periods of time which range from hours or days to months or even years. The "mix" of stagehands at a particular venue on any given day may be different depending on the needs of the particular theatrical production or at what phase of the production the stagehand is working. The frequency of any particular theatrical production, the needs of a particular theatrical production, the availability of financing for such productions must inevitably affect the level of employment of IATSE members not only within the industry generally but also at specific venues such as the Elgin Winter Garden Theatre. Theatres may be "dark" for periods of time until the production or presentation of new theatrical performances is arranged. Conversely "problems" or the requirement to meet deadlines may require the employment of more stagehands at a venue if only on a short term basis. Corporate entities such as Theatremark may produce or present a number of theatrical productions at different venues within IATSE's jurisdiction whether simultaneously or not.

74. For all of these reasons the complement of stagehands at a particular venue may vary markedly from day to day making it very difficult to pin down with any precision individuals who should be treated unequivocally as "employees in the bargaining unit" as required by the Act. Naturally the union's hiring hall also significantly affects the employment of stagehands within the industry.

75. In light of these various considerations, the inherent transitory, uncertain and ephemeral nature of employment of stagehands in the theatrical industry and the use of the hiring hall within the industry we agree that it is most appropriate to use the application date in order to "ascertain the number of employees in the bargaining unit at the time the application was made" as required by the Act.

76. For purposes of "the count", the employee complement is that which exists on the application date. We fully recognize that the number of employees may well be different on that day from the day before or the day after. Nevertheless a bright line test which focuses on the application date (as is also the case in the construction industry) is certain, easy to understand and administers and avoids costly and time consuming litigation associated with other possible alternatives. It is a compromise which avoids the complex and uncertain determinations which would need to be litigated if the Board and the parties were required to inquire into reasons why certain persons were/were not working at a particular venue either on a particular day or during any chosen "representative period" during which any number of stagehands *could* have worked at the venue. In this particular case for example approximately one hundred different stagehands worked at the complex on different days in different theatrical productions and for various lengths of time in the period from Monday, May 28th, 1990 to Tuesday, June 26th, 1990. Only one IATSE member worked at the complex in the 30-day period thereafter. If the Board were to adopt its usual "30-30 rule" to determine if persons not at work at the complex on the application date should nevertheless also be included for purposes of "the count", determinations of the "list" would, in many

cases be an extremely difficult, if not impossible task. Focusing on the application date provides an expeditious and orderly method of processing the certification application without the obvious prejudice caused by delay if other alternatives were adopted.

77. Secondly, we have made the single employer declaration pursuant to section 1(4) of the Act notwithstanding the fact that the applicant has not established any bargaining rights with respect to the employees of any of the respondents. The Board does not normally grant such declarations unless a labour relations purpose would be served by such declaration. Typically the labour relations purposes served relate to the established bargaining rights of the union which seeks the declaration. Nothing in this decision should be taken as an indication that the Board seeks to depart from its usual practice or that the Board will entertain applications or grant common employer declarations in a vacuum or in circumstances where no bargaining rights exist and where no immediate labour relations purposes would be served in granting that declaration.

78. The parties to these proceedings have spent both time and money in their litigation of the single employer declaration. The evidence before us established that notwithstanding the apparent lack of “formal” bargaining rights, IATSE continues to have a “relationship” with the named respondents. From the evidence, although this “relationship” is not founded on either a voluntary recognition of bargaining rights or certification under the auspices of the Act, it is ongoing and appears to be quite common within the industry. For these reasons we are of the view that immediate labour relations purposes, albeit not the “usual” ones, are served by granting the common employer declaration. It can assist the parties in their ongoing and future relationships and will make it unnecessary to re-litigate this particular issue at some future date.

79. For all of these reasons the declaration sought in Board File No. 1678-90-R is granted. We hereby declare that Theatrecorp Ltd., WGC Facility Management Corporation and Theatremark Ltd. constitute one employer for purposes of the *Labour Relations Act*. However, as there were no employees of the named respondents at work in the bargaining unit at the time the application was made the certification application in Board File No. 0626-90-R is dismissed.

DECISION OF BOARD MEMBER CAROLE McDONALD; March 13, 1992

1. I concur with the majority decision with respect to the single employer declaration. I do not however concur with their decision on the certification application.

2. IATSE asserts that the owner-operator of the complex is the employer of the stagehands. In this instance that owner-operator employer is the fully integrated single employer WGC, Theatrecorp, Theatremark.

3. WGC, Theatrecorp and Theatremark together comprise “the house” and as operator and licensor of the complex to third party users “the house” provides a full range of services including the supply and employment of stagehands and other technical services personnel required by such third party licensee for its theatrical production;

4. By an agreement in writing dated April 12, 1990 WGC retained the services of Theatrecorp to provide and/or co-ordinate all technical services;

5. As stated in the majority decision, paragraph 9, and reproduced here, Theatrecorp provides to WGC services including:

- i) All production and technical services for the Complex as they relate

to the requirements for production and/or presentations taking place within the Complex;

- ii) All arranging or co-ordination of the providing of labour required to perform the functions as outlined in number i) above;
- iii) All payroll functions (including but not limited to payment, processing, workers' compensation insurance, deductions, benefits etc.) required to remunerate any and all labour retained by THEATRE-CORP to perform any of its obligations under this agreement;
- iv) The services of Ms. Sandra Robinson as Liaison and co-ordinator between WGC and Theatrecorp.

The agreement further states that WGC will:

- i) Reimburse Theatrecorp for any and all disbursements made on behalf of WGC in the performance of the functions outlined above;
- ii) Withhold a sufficient amount of funds from box office receipts sold on behalf of licensees of the Complex in order to reimburse Theatrecorp for costs paid on behalf of such licensees;
- iii) Provide Theatrecorp with office space, a telephone and such other office equipment as may be required to carry out its tasks;

6. In an agreement dated December 1, 1989, Ms. Robinson as liaison and co-ordinator between WGC and Theatrecorp contracted to provide the following services to Theatrecorp as outlined in the majority decision, paragraph 10, and reproduced here:

- i) Production management services to Theatrecorp for any and all presentations produced and/or presented by Theatrecorp within the complex;
- ii) Production management co-ordination and/or assistance to licensees within the complex for any and all presentations produced and/or presented by such licensees;
- iii) Supervision and/or co-ordination of all technical services within the complex in order to protect the complex from unauthorized persons performing any technical services within the complex.

7. As licensor of the complex WGC has chosen to provide theatre related services, including technical and production services and payroll services to its licensees through the offices of Theatrecorp. In this instance WGC, Theatrecorp, Theatremark performed the various functions of the employer, vis-a-vis the stagehand employees. Union counsel in his submissions focused primarily on the legal "form" of the evidence. The majority decision at paragraph 58, however, states that "the *viva voce* evidence however either contradicted or modified that legal form. In the circumstances we find it more appropriate to focus on the substance of the various transactions and agreements rather than their legal form". I do not agree, it is my opinion parole evidence can not be introduced to alter, abrogate or add to the terms of the written contracts that are in evidence before this panel. *Control of the complex and stagehand employees belongs to WGC/Theatrecorp/Theatremark through its lease agreements with the third parties.*

8. These agreements provide that Ms. Robinson assists and advises the licensee in determining the classification of stagehands, the size of the crew and the hours of work. Ms. Robinson generally contacts a business agent of the union to advise them of the call for members.

9. Stagehand employees require little or no direct control or supervision by either the licensor or the licensee. As stated in the majority decision at paragraph 38:

In fact IATSE members require little supervision. As skilled, qualified and “professional” members of their craft the members are generally merely directed to the type of work to be performed.As skilled technicians who regularly work at a particular venue on many different productions, they know by experience and training generally what needs to be done.

10. The manner of control of the licensee of the stagehand employees in this instance is limited to that of informing the lead hand what they require for their production and having the lead hand if necessary instruct the other employees to carry out the tasks, as required, within the allotted time.

11. I believe the banquet/catering and convention business to be analogous to the instant application. The banquet/catering/convention facilities are leased for various functions, similar to this complex being leased for productions. The lessor generally agrees to provide to the lessee a full range of services including the supply and employment of its banquet/catering/convention employees in the same manner this complex does with stagehand employees.

12. The lessee may direct and supervise the banquet/catering/convention employees in the same manner Mr. McKay directed the stagehand employees. This does not however, make the lessee the employer of the employee providing the services it has contracted for. It would be ridiculous to expect that each lessee would be the employer of these employees, as defined in the *Ontario Labour Relations Act*. In my opinion, it would effectively deny these employees from ever being able to exercise their rights under the Act.

13. *Payroll functions* are provided by Theatrecorp to licensees of the complex. All time sheets for IATSE members working at the complex are provided to Ms. Robinson by the department heads regardless of the identity of the licensee to the complex. Ms. Robinson checks the timesheets, investigates any discrepancies and ultimately forwards the timesheets to WGC. IATSE members receive paycheques and T4 statements from Theatrecorp for work performed at the complex. As part of its contractual agreement (reproduction page 1, paragraph 3 (iii)) to lease the complex and all of its service the licensee of the complex bears the burden of remuneration of wages and all other costs paid on its behalf by Theatrecorp.

14. With respect to *Discipline and Authority* to dismiss the majority decision at paragraph 39 states:

Some of the traditional aspects of the employer/employee relationship such as the appointment of “lead hands” or “working supervisors” and the imposition of discipline are not present when IATSE members are engaged. This is so whether WGC licenses the complex to a third party licensee or to one of the other respondents. Thus for example it is generally the union which determines who will be the department head(s) during a theatrical production, not the producer or presenter of the production. Similarly matters of discipline of employees are generally dealt with internally by the union through the head or union steward on site. The producer or presenters role in disciplining IATSE members appears to be limited to informing IATSE, the department head and/or the steward of any problem.

This would once again be similar to that of a lessee of banquet facilities.

15. With respect to the factor as to *the party hiring the employees*, Ms. Robinson placed the call to the union hiring hall as she generally does. It was her assistance and advice to the licensee that determined the classification of stagehand, the size of the crew and the hours of work. Ms. Robinson fulfilled her obligations as licensor in providing the labour required to perform the functions of this production.

16. WGC, TheatreCorp and Theatremark is *the party who is commonly perceived to be the employer by the stagehand employees*. When asked for whom they work the member answered “the Elgin Theatre” or the “Elgin Winter Garden Theatre”.

17. With respect to the seventh and final criteria I do not believe that the evidence discloses that there was any *intention to create the relationship of employer and employee* by either the licensor respondents or the third party licensee in the theatrical productions which were presented or produced.

18. Unlike the majority, I believe that the policy considerations favour a finding that the house is the employer. Paragraph 60 of the majority decision states the following:

From the applicant's perspective it is extremely onerous to require it to seek to be certified for each theatrical production which may be produced or presented at the complex. Theatrical productions may last for periods of time which range from hours or days to months or even years. From the evidence before us with respect to TheatreCorp's and Theatremark's own past history it is apparent that legal ownership and make-up of production companies may itself undergo several different transformations as new partnerships and entities are created to produce or present different theatrical productions. In these circumstances granting bargaining rights to the applicant union with respect to employees of a particular “producer” appears somewhat illusory and meaningless. The producer certified today may be gone tomorrow - never to return to the venue or perhaps to return in some other legal form. As a result, within the industry only the venue, “the house”, is an enduring permanent factor. A constant which is easily identifiable within an industry in which both “producers” and those who work in relation to their productions are essentially transitory.

19. During the months of June and July 1990, seven theatrical productions and events (as listed in majority decision paragraph 19) requiring the use of stagehands took place. *As the majority decision is written this would have required the union to organize seven times and file seven separate certification applications for seven separate employers*. The certification applications would not be limited to those seven productions in June and July. There could possibly be numerous applications on the same day, covering the same employees performing the same work under the same roof, for the same house (but for different producers). I believe this would have the effect of *denying these employees their rights* to organize themselves into a union, become certified and have a collective bargaining relationship with “their” employer. Further it *does not make labour relations sense* nor is it *the intent of the Act*. Ironical that the majority in this instance does not have the same policy considerations that it would have when considering an application for a bargaining unit that would create “*undue fragmentation*”.

20. The numbers and types of employers are only as limited as one's imagination. Would a charity, political party, church, rock band, trade union, government body or any other organization leasing the Complex for a production/event be the employer of the stagehands? In my opinion that would be analogous to one who rents a hotel room being the employer of the housekeeping employee who services that hotel room. A ridiculous thought indeed!

21. I believe that the *house does impact upon the employment or condition of employment* of this group of employees and should therefore be accountable for labour relations matters pertaining to this group of employees. The house is in the business of using the complex to present

theatrical productions and in authorizing other persons to use the complex through lease agreements.

22. The house determines who it will lease this complex to. The house determines when it will lease the complex. The house determines for how long it will lease the complex. The house further determines what the cost will be for the services, including the labour, for the lease of the complex. The house through its lease agreements *has economic control* over the stagehand employees.

23. Therefore, for all of the above reasons I would find that WGC/TheatreCorp/Theatremark, "the house" is the employer of the stagehand employees.

COURT PROCEEDINGS

2096-89-OH (Court File No. 1093/90) Steve Szeghalmi, Applicant v. Ontario Labour Relations Board and National Plastic Profiles Inc., Respondents

Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness beached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed

Board Decision reported at [1990] OLRB Rep. Oct. 1078.

Ontario Court of Justice, Divisional Court, Callaghan, C.J.O.C., McMurtry, A.C.J.O.C., and Caruthers J., March 6, 1992.

CALLAGHAN C.J.O.C. (Endorsement): We are all of the view that the Board did not err or exceed its jurisdiction in refusing to grant leave to the applicant to recall the witness Punambolam and examine him on *all* issues set forth in the particulars. This denial did not in our view amount to a denial of natural justice and loss of jurisdiction. Even if the Board's ruling in this matter is not correct, and we do not rule on that, it was an error made within jurisdiction. Only a refusal to hear evidence because the subject matter was one into which the adjudicator wrongfully concluded he had no jurisdiction to inquire would amount to jurisdictional error. Otherwise a wrong ruling on evidence does not *ipso facto* amount to jurisdictional error. In our view in the circumstances of this case no such error was made.

As to s.24(7) of the *Occupational Health and Safety Act* we are all of the view that the construction given to this provision by the Board (Appeal Book p.35, para 46 et seq.) is one which can be rationally supported by the legislation and is not so patently unreasonable that it would demand this court's intervention.

Application dismissed. No order as to costs.

CASE LISTINGS FEBRUARY 1992

	PAGE
1. Applications for Certification	51
2. Applications for First Contract Arbitration	63
3. Applications for Declaration of Related Employer.....	63
4. Sale of a Business	64
5. Crown Transfer Act	65
6. Applications for Declaration Terminating Bargaining Rights.....	65
7. Applications for Declaration of Unlawful Strike	67
8. Complaints of Unfair Labour Practice	67
9. Applications for Religious Exemption	70
10. Applications for Consent to Early Termination of Collective Agreement	70
11. Jurisdictional Disputes.....	70
12. Applications for Determination of Employee Status.....	70
13. Complaints under the Occupational Health and Safety Act	71
14. Colleges Collective Bargaining Act.....	71
15. Construction Industry Grievances	71
16. Complaints under the Smoking in the Workplace Act	75
17. Applications for Reconsideration of Board's Decision	75

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1992

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0851-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Royal Homes Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Royal Homes Limited in the County of Peterborough, save and except supervisors, persons above the rank of supervisor, truck drivers, construction site finishers, office and sales staff" (115 employees in unit)

0928-90-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Applicant) v. Thermogenics Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Thermogenics Inc. employed in the Town of Aurora, save and except foremen, persons above the rank of foreman, office, clerical, and sales staff, and students employed during the school vacation period" (37 employees in unit) (*Having regard to the agreement of the parties*)

2745-90-R: IWA - Canada (Applicant) v. Timberjack Inc. (Respondent)

Unit: "all employees of Timberjack Inc. in the City of Thunder Bay, save and except foremen, persons above the rank of foreman, office and clerical staff, and salespersons" (10 employees in unit) (*Having regard to the agreement of the parties*)

1028-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Valeira Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of Valeira Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Valeira Construction Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland (Board Area 12), the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Landsdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville (Board Area 29), and the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville (Board Area 30), save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit) (*Clarity Note*)

1214-91-R: Practical Nurses Federation Of Ontario (Applicant) v. Victorian Order of Nurses - Metropolitan Toronto Branch (Respondent)

Unit: "all registered nursing assistants engaged in a nursing capacity employed by the Victorian Order of Nurses - Metropolitan Toronto Branch, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (20 employees in unit) (*Having regard to the agreement of the parties*)

1338-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. International Contractors Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of International Contractors Inc. in the indus-

trial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of International Contractors Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1422-91-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Lamson and Sessions of Canada Ltd (Respondent)

Unit: "all office and clerical employees of Lamson & Sessions of Canada Ltd. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, sales and customer service staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

1562-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Vilar Construction Masonry Inc. , Alex Almeida Construction Limited (Respondents) v. International Union of Bricklayers and Allied Craftsmen, Local 5 (Intervener) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of Vilar Construction Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of Vilar Construction Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1564-91-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Alex Almeida Construction Limited, Vilar Construction Masonry Inc. (Respondents) v. Labourers' International Union of North America, Local 1059 (Intervener) v. Group of Employees (Objectors)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Vilar Construction Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Vilar Construction Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

1637-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. F.G. Excavation & Construction Ltd., F & G Construction (Ottawa) Ltd. (Respondents)

Unit: "all employees of F.G. Excavation & Construction Ltd., F & G Construction (Ottawa) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of F.G. Excavation & Construction Ltd., F & G Construction (Ottawa) Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2499-91-R: Graphic Communications International Union, Local N-1 (Applicant) v. Paragon Industrial Photographic Reproductions Limited (Respondent)

Unit: "all employees of Paragon Industrial Photographic Reproductions Limited in the Municipality of Metropolitan Toronto, save and except non-working foreperson, persons above the rank of non-working foreperson, office, clerical, sales staff and students employed during the school vacation period" (46 employees in unit)

2612-91-R: International Union, United Plant Guard Workers of America (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all security guards in the employ of Burns International Security Services Limited, in the County of Essex, save and except guard inspectors, persons above the rank of guard inspector, office, clerical and sales staff, and students employed during the school vacation period” (39 employees in unit) (*Having regard to the agreement of the parties*)

2847-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Rimac Brothers Construction (Calgary) Ltd. (Respondent)

Unit: “all construction labourers in the employ of Rimac Brothers Construction (Calgary) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Rimac Brothers Construction (Calgary) Ltd. in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2863-91-R; 2864-91-R: Kingston Typographical Union Local 204 Printing, Publishing & Media Workers Sector Communication Workers of America Local 14018 (Applicant) v. Whig-Standard Co. Ltd. a division of the Southam Newspaper Group (Respondent)

Unit #1: “all office and clerical employees in the business office of Whig-Standard Co. Ltd. a division of the Southam Newspaper Group in Kingston, Ontario, save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of Whig-Standard Co. Ltd. a division of the Southam Newspaper Group in Kingston, Ontario in the Advertising and Classified Departments, save and except Supervisors and persons above the rank of Supervisor, Advertising Services Supervisor, Retail Sales Supervisor, Co-op Manager, Classified Advertising Manager, Retail Advertising Manager, National Advertising Manager, Advertising Director, Advertising Directors’ Secretary, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (28 employees in unit) (*Having regard to the agreement of the parties*)

3045-91-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Manny’s Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of Manny’s Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Manny’s Construction Ltd. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

3162-91-R: United Steelworkers of America (Applicant) v. Industrial Metal Company of Canada a division of Lake Ontario Steel Company (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: “all employees of Industrial Metal Company of Canada a division of Lake Ontario Steel Company in the Municipality of Metropolitan Toronto and the Region of Durham, save and except forepersons and persons above the rank of foreperson, office staff and persons for whom any trade union held bargaining rights as of January 2, 1992” (25 employees in unit)

3193-91-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell (Respondent)

Unit: “all employees employed by the Conseil des écoles séparées catholiques de langue française de Prescott-

Russell as Teachers' Aid/Educators, save and except Superintendents, persons above the rank of Superintendent and persons for whom any trade union held bargaining rights as of January 8, 1992" (32 employees in unit) (*Having regard to the agreement of the parties*)

3194-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. Le Conseil des écoles françaises de la communauté urbaine de Toronto (Respondent)

Unit: "tous les employé(e)s des services à l'élève du Conseil des écoles françaises de la communauté urbaine de Toronto à l'exception des superviseur(e)s et des personnes dont le classement est supérieur à celui de superviseur(e) et les personnes au nom de qui un syndicat détient des droits de négociations à la date du 8 janvier 1992 Note de clarification: Les employé(e)s des services à l'élève incluent les classifications suivantes: conseiller(ère)s en psychopédagogie, travailleur(euse)s sociales, orthophonistes et éducateur(trice)s spécialisé(e)s" (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3243-91-R: IWA- Canada (Applicant) v. Domtar Packaging, A division of Domtar Inc. (Respondent)

Unit: "all employees of Domtar Packaging, A division of Domtar Inc. located at 7700 Keele Street in Concord, save and except foremen, persons above the rank of foreman, office and sales staff" (148 employees in unit) (*Having regard to the agreement of the parties*)

3281-91-R: Ontario Public Service Employees Union (Applicant) v. Moosonee District School Board (Respondent)

Unit: "all employees of Moosonee District School Area Board, in Moosonee, save and except supervisors, persons above the rank of supervisor and Secretary to the Business Administrator" (12 employees in unit) (*Having regard to the agreement of the parties*)

3282-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Uniondale Cheese Factory Inc. (Respondent)

Unit: "all employees of Uniondale Cheese Factory Inc. in Uniondale in the County of Oxford, save and except Supervisors, persons above the rank of Supervisor, office, clerical, retail store and laboratory staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (13 employees in unit)

3284-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Jack Law Contractors Inc. (Respondent)

Unit: "all construction labourers in the employ of Jack Law Contractors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Jack Law Contractors Inc. in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, and Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

3293-91-R: Ontario Public Service Employees Union (Applicant) v. Prince Edward Association for Community Living (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of Prince Edward Association for Community Living in the Town of Picton, save and except Assistant Director, persons above the rank of Assistant Director, Manager of Administrative Supports, Financial Officer, Supervisor of Integration and Family Support, Supervisor of the Step Program, Service Facilitator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the Prince Edward Association for Community Living in the Town of Picton regularly employed for not more than 24 hours per week and students employed during the school vacation

period, save and except Assistant Director, persons above the rank of Assistant Director, Manager of Administrative Supports, Financial Officer, Supervisor of Integration and Family Support, Supervisor of the Step Program, and Service Facilitator” (26 employees in unit) (*Having regard to the agreement of the parties*)

3294-91-R: Canadian Union of Public Employees (Applicant) v. Centre Pre-Scolaire Aladin Inc./Aladin Pre-School Center Inc. (Respondent)

Unit: “all employees of the Centre Pre-Scolaire Aladin Inc./Aladin Pre-School Center Inc. in the Regional Municipality of Ottawa Carleton, save and except Directors, persons above the rank of Director and the Secretary/Administrative Assistant to the Director” (12 employees in unit) (*Having regard to the agreement of the parties*)

3307-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 764627 Ontario Limited c.o.b. as Swiss Chalet Restaurant (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by 764627 Ontario Limited at its Swiss Chalet Take-out and Restaurant at 2930 Carling Ave. in the City of Ottawa, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (54 employees in unit) (*Having regard to the agreement of the parties*)

3308-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. D. Isabella Investments Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by D. Isabella Investments Inc. at its Swiss Chalet Take Out and Restaurant at 9625 Yonge St. in the Town of Richmond Hill, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (53 employees in unit) (*Having regard to the agreement of the parties*)

3309-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students at Cara Operations Limited at its Swiss Chalet Take-out and Restaurant at 1800 Sheppard Avenue East in the Municipality of Metropolitan Toronto save and except Assistant Dining Room Manager and persons above the rank of Assistant Dining Room Manager” (6 employees in unit) (*Having regard to the agreement of the parties*)

3311-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 601210 Ontario Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by 601210 Ontario Inc. at its Swiss Chalet Take-out and Restaurant at 1563 Main Street West in the City of Hamilton, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (40 employees in unit) (*Having regard to the agreement of the parties*)

3312-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Perry Hoo Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Perry Hoo Foods Limited at its Swiss Chalet Take-out and Restaurant at 4211 Yonge Street in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (35 employees in unit)

3313-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. J. Cabral Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders, and students by J. Cabral Foods Limited at its Swiss Chalet Take-out and Restaurant at 560 Fairway Road in the city

of Kitchener save and except Assistant Dining Room Managers, persons above the rank of Assistant Dining Room Manager” (41 employees in unit) (*Having regard to the agreement of the parties*)

3314-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Noel Cao Investments Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Noel Cao Investments Inc. at its Swiss Chalet Take-out and Restaurant at 2877 Bayview Avenue in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (6 employees in unit) (*Having regard to the agreement of the parties*)

3315-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Vetrone Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Vetrone Foods Limited at its Swiss Chalet Take Out and Restaurant at 1011 Upper Middle Road West in the Town of Oakville, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (47 employees in unit) (*Having regard to the agreement of the parties*)

3317-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Tony Barradas Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Tony Barradas Foods Limited at its Swiss Chalet Take-out and Restaurant at 1680 Kingston Road in the Town of Pickering, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (58 employees in unit) (*Having regard to the agreement of the parties*)

3318-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Barry Kong Foods Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Barry Kong Foods Inc. at its Swiss Chalet Take-out and Restaurant at 4452 Sheppard Avenue East in the Municipality of Metropolitan Toronto save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (61 employees in unit) (*Having regard to the agreement of the parties*)

3320-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Famz Foods Limited c.o.b. as Swiss Chalet Restaurant (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Famz Foods Limited c.o.b. as Swiss Chalet Restaurant at its Swiss Chalet Take-out and Restaurant at 3078 Dougall Road in the City of Windsor, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (46 employees in unit) (*Having regard to the agreement of the parties*)

3321-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. DeMelo Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by DeMelo Foods Limited at its Swiss Chalet Take-out and Restaurant at 510 Hespeler Road in the City of Cambridge, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (50 employees in unit) (*Having regard to the agreement of the parties*)

3322-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Cara Operations Limited at its Swiss Chalet Take-out and Restaurant at 1591 Wilson Ave. in the

Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (6 employees in unit) (*Having regard to the agreement of the parties*)

3324-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Cara Operations Limited at its Swiss Chalet Take-out and Restaurant at 245 Dixon Road in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (12 employees in unit) (*Having regard to the agreement of the parties*)

3326-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. J. F. Sousa Investments Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by J. F. Sousa Investments Inc. at its Swiss Chalet Take-out and Restaurant at 269 Queen Street East in the City of Brampton, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (59 employees in unit) (*Having regard to the agreement of the parties*)

3327-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 412873 Ontario Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by 412873 Ontario Limited at its Swiss Chalet Take-out and Restaurant at 6666 Lundy’s Lane in Niagara Falls, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (28 employees in unit) (*Having regard to the agreement of the parties*)

3328-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 580201 Ontario Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by 580201 Ontario Limited at its Swiss Chalet Take-out and Restaurant at 285 Geneva Street in the City of St. Catharines, save and except Assistant Managers and persons above the rank of Assistant Manager” (43 employees in unit) (*Having regard to the agreement of the parties*)

3329-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Ko Hag Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Ko Hag Foods Limited at its Swiss Chalet Take-out and Restaurant at 180 Steeles Avenue West in the Municipality of Metropolitan Toronto, save and except Assistant Managers and persons above the rank of Assistant Manager” (50 employees in unit) (*Having regard to the agreement of the parties*)

3330-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. C. M. L. Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by C. M. L. Foods Limited at its Swiss Chalet Take-out and Restaurant at 205 Marycroft Avenue in the City of Vaughan, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (50 employees in unit) (*Having regard to the agreement of the parties*)

3331-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Famz Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Famz Foods Limited at its Swiss Chalet Take-out and Restaurant at 6645 Tecumseh Road East in the

City of Windsor, save and except Assistant Manager and persons above the rank of Assistant Manager” (46 employees in unit) (*Having regard to the agreement of the parties*)

3332-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Cara Operations Limited at its Swiss Chalet Take-out and Restaurant at 950 Lawrence Avenue West in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (44 employees in unit) (*Having regard to the agreement of the parties*)

3333-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Albert Melo Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Albert Melo Foods Limited at its Swiss Chalet Take-out and Restaurant at 362 Yonge Street in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (53 employees in unit) (*Having regard to the agreement of the parties*)

3334-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Ilda Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Ilda Foods Limited at its Swiss Chalet Take-out and Restaurant at 735 Queenston Road in the City of Hamilton, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (54 employees in unit) (*Having regard to the agreement of the parties*)

3336-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Danny Mo Foods Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Danny Mo Foods Inc. at its Swiss Chalet Take-out and Restaurant at 1113 Finch Avenue West in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (46 employees in unit) (*Having regard to the agreement of the parties*)

3338-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Frank Lopes Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Frank Lopes Foods Limited at its Swiss Chalet Take-out and Restaurant at 549 Kerr Street in the Town of Oakville, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (28 employees in unit) (*Having regard to the agreement of the parties*)

3340-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Viriato Foods Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Viriato Foods Inc. at its Swiss Chalet Take-out and Restaurant at 225 Dundas Street East in the City of Mississauga, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (36 employees in unit) (*Having regard to the agreement of the parties*)

3341-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Reistaurants Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Reistaurants Inc. at its Swiss Chalet Take-out and Restaurant at 269 Rexdale Boulevard in the

Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (48 employees in unit) (*Having regard to the agreement of the parties*)

3342-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Mark Boddy Foods Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Mark Boddy Foods Inc. at its Swiss Chalet Take-out and Restaurant at 1881 Leslie Street in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (43 employees in unit) (*Having regard to the agreement of the parties*)

3343-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. C. Calisto Foods Inc. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by C. Calisto Foods Inc. at its Swiss Chalet Take-out and Restaurant at 1180 Upper James Street in the City of Hamilton, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (48 employees in unit) (*Having regard to the agreement of the parties*)

3344-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Rahims Food Ltd. (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Rahims Food Ltd. at its Swiss Chalet Take Out & Restaurant at 540 Montreal Rd. in the City of Ottawa, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (45 employees in unit) (*Having regard to the agreement of the parties*)

3345-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Valdo Melo Foods Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Valdo Melo Foods Limited at its Swiss Chalet Take-out and Restaurant at 2422 Fairview Street in the City of Burlington, save and except Assistant Managers and persons above the rank of Assistant Manager” (54 employees in unit) (*Having regard to the agreement of the parties*)

3346-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. L. DeSousa Enterprises Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by L. DeSousa Enterprises Limited at its Swiss Chalet Take-out and Restaurant at 1110 O’Connor Drive in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (57 employees in unit) (*Having regard to the agreement of the parties*)

3382-91-R: Service Employees Union, Local 663 (Applicant) v. Lennox and Addington Resources for Kids Association (Respondent)

Unit: “all employees of Lennox and Addington Resources for Kids Association in the Township of Richmond, save and except Administrative Assistants and persons above the rank of Administrative Assistant” (6 employees in unit) (*Having regard to the agreement of the parties*)

3447-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Stouffville Foods Inc. c.o.b. as Stouffville IGA (Respondent)

Unit: “all employees of Stouffville Foods Inc. c.o.b. as Stouffville IGA in the Town of Stouffville, regularly employed for not more than 24 hours per week, save and except Assistant Managers, persons above the rank

of Assistant Manager, Meat Manager and office and clerical staff” (17 employees in unit) (*Having regard to the agreement of the parties*)

3452-91-R: United Steelworkers of America (Applicant) v. Brampton Plate & Structural Steel Rolling Inc. (Respondent)

Unit: “all employees of Brampton Plate & Structural Steel Rolling Inc. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor and office and clerical staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

3461-91-R: Public Service Alliance of Canada (Applicant) v. James Bay General Hospital (Respondent)

Unit: “all employees of the James Bay General Hospital in Moosonee, Fort Albany and Attawapiskat, save and except Directors, persons above the rank of Director, professional medical staff, Payroll/Personnel Officer, Administrative Secretary and persons for whom any trade union held bargaining rights as of January 29, 1992” (78 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3465-91-R: Canadian Union of Public Employees (Applicant) v. Nipissing District Social Services Board (Respondent)

Unit: “all employees of the Nipissing District Social Services Board in the District of Nipissing, save and except Assistant Director of Services, persons above the rank of Assistant Director of Services and the Confidential Secretary” (13 employees in unit) (*Having regard to the agreement of the parties*)

3481-91-R: Canadian Security Union (Applicant) v. Canada Security Corporation (Respondent)

Unit: “all security guards employed by Canada Security Corporation in and out of the Municipality of Metropolitan Toronto, save and except Mobile Response Officers, persons above the rank of Mobile Response Officer, Investigators, and office and clerical staff” (32 employees in unit) (*Having regard to the agreement of the parties*)

3496-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: “all employees of Empire Maintenance Industries Inc. employed at B.C.E. Place at 161 Bay Street and 181 Bay Street in the Municipality of Metropolitan Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson, persons regularly employed for not more than 24 hours per week and students employed for the school vacation period” (59 employees in unit) (*Having regard to the agreement of the parties*)

3568-91-R: Niagara Health Care and Service Workers Union Local 302 Affiliated with the Christian Labour Association of Canada (Applicant) v. 714445 Ontario Ltd. (Respondent)

Unit #1: “all employees of 714445 Ontario Ltd. at Maplecrest Village at 85 Main St. East in Grimsby, save and except Managers/Supervisors and persons above the rank of Manager/Supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of 714445 Ontario Ltd. at Maplecrest Village at 85 Main St. East in Grimsby, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Supervisors/Managers and persons above the rank of Supervisor/Manager, office and clerical staff” (20 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3165-91-R: United Steelworkers of America (Applicant) v. Industrial Metal Company of Canada a division of Lake Ontario Steel Company (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: “all employees of Industrial Metal Company of Canada a division of Lake Ontario Steel Company in the Municipality of Metropolitan Toronto and the Region of Durham, save and except forepersons and persons above the rank of foreperson, office staff and persons for whom any trade union held bargaining rights as of January 2, 1992” (26 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	26
Number of persons who cast ballots	25
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters’ list	24
Number of segregated ballots cast by persons whose names appear on voters’ list	1
Number of ballots marked in favour of applicant	20
Number of ballots marked in favour of intervener	4
Ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

1337-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Artset Forming and General Contracting (Respondent) (8 employees in unit)

2895-91-R: Labourers’ International Union of North America, Local 493 (Applicant) v. Reichhold Limited (Respondent) (62 employees in unit)

3370-91-R: United Steelworkers of America (Applicant) v. Alros Products Limited c.o.b. as Polytarp Products and, Compass Plastics Limited (Respondents) (90 employees in unit)

3451-91-R: London & District Service Workers’ Union, Local 200 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Kitchener-Waterloo Hospital (Respondent) (261 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3291-86-R: United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Applicant) v. Ellis-Don Limited (Respondent) v. Labourers’ International Union of North America, Local 183 (Intervener #1) v. The Form Work Council of Ontario (Intervener #2) v. Metropolitan Toronto Apartment Builders’ Association (Intervener #3)

Unit: “all carpenters and carpenters’ apprentices employed by Ellis-Don Limited or Ellis-Don Construction Limited in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (12 employees in unit)

Number of persons listed as eligible	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	4

3134-91-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Norbro Holdings Ltd. c.o.b. as Best Western Parkway Inn (Respondent)

Unit: “all employees of Norbro Holdings Ltd. c.o.b. as Best Western Parkway Inn in the City of Cornwall, save and except Assistant Managers, persons above the rank of Assistant Manager, office and clerical staff, persons employed for not more than 24 hours per week and students employed during the school vacation period” (43 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons listed as eligible	43
Number of persons who cast ballots	39

Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	37

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0937-90-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Holiday Inns of Canada Ltd. (Respondent)

Unit: “all employees of Holiday Inns of Canada Ltd. at its hotel located at 970 Dixon Road in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, auditors, reservation agents, guest service representatives, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (131 employees in unit)

Number of persons listed as eligible	131
Number of persons who cast ballots	117
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters’ list	109
Number of segregated ballots cast by persons whose names appear on voters’ list	8
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	79
Number of ballots segregated and not counted	8

2168-91-R: United Steelworkers of America (Applicant) v. Weatherstrong Building Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Weatherstrong Building Products Ltd. in the town of Smiths Falls, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (31 employees in unit)

Number of persons listed as eligible	41
Number of persons who cast ballots	40
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	33

Applications for Certification Withdrawn

0291-89-R: United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Applicant) v. Town-Wood Homes Limited (Respondent) v. Labourers’ International Union of North America, Local 183

2522-91-R; 2685-91-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Beaver Materials Handling Company Ltd. (Respondent)

2623-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Marco Masonry & General Contractor (Respondent)

2661-91-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Brunel Construction Limited (Respondent) v. Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Intervener)

2668-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Brunel Construction Limited (Respondent) v. Labourers’ International Union of North America, Local 506 (Intervener)

3266-91-R: International Union of Operating Engineers Local 772 (Applicant) v. Hopkins Steelworks Ltd. (Respondent) v. United Steelworkers of America (Intervener)

3283-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. B V A Systems (Respondent)

3373-91-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the County of Grey (Respondent)

3451-91-R: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Kitchener - Waterloo Hospital (Respondent)

3486-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. DGM Group (Respondent)

3512-91-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. J.B. Smylie Supermarket Inc. (Respondent)

3514-91-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Lalonde Supermarket Inc. (Respondent)

3515-91-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Donald Street Supermarket Inc. (Respondent)

3516-91-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. A.F. O'Reilly Supermarket Inc. (Respondent)

3517-91-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Alimentation Andre Desjardins Inc. (Respondent)

3518-91-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Glatt's Supermarket Inc. (Respondent)

3573-91-R: Registered Nurses of Extendicare Bayview Association (Applicant) v. Extendicare Health Services Inc. (Respondent) v. Canadian Union of Public Employees (Intervener)

3598-91-R: Retail, Wholesale & Department Store Union (Applicant) v. Scott's Food Services Inc. (Respondent)

APPLICATION FOR FIRST CONTRACT ARBITRATION

2858-91-FC: Southern Ontario Newspaper Guild, Local 87 (Applicant) v. The Cambridge Reporter, a Division of Canadian Newspapers Company Limited (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1648-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Cooper Corporation Limited and Versa Care Development Corporation (Respondent) (*Withdrawn*)

3219-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. T. Edison Electrical Enterprises Inc., Rudy Chiefari c.o.b. as Westview Electric Contractors, and Westview Electric Contractors Inc. (Repondents) (*Granted*)

1266-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 221 (Applicant) v. Lewin Kingston Division of Brousseau - Robidoux Enterprises Ltd., Regional Network Contractors Ltd. and ML Office Enterprises (Respondents) (*Dismissed*)

1339-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America

(Applicant) v. International Contractors Inc., Artset Forming & General Contracting (Respondents) *(Dismissed)*

2607-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Bonik Incorporated, and Serbecan Inc. (Respondents) *(Granted)*

2835-91-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. J.P. Drywall, J.P. Acoustics (Kitchener) Inc., J.P. Acoustic and Drywall Ltd., J & P Drywall (Respondents) *(Withdrawn)*

2862-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. F.G. Excavation & Construction Ltd., F & G Construction (Ottawa) Ltd. (Respondents) *(Granted)*

2955-91-R: United Brotherhood of Carpenters and Joiners of America. Local 2041 (Applicant) v. D'Angelo Plastering Company (1983) Ltd. and Frank Augusto Construction Ltd., (Respondents) *(Withdrawn)*

2988-91-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Kinell Construction Co. Limited and, Kinell Forming Limited (Respondents) *(Withdrawn)*

3068-91-R: Sheet Metal Workers' International Association, Local Union 473 & Ontario Sheet Metal Workers' Conference (Applicant) v. Servair Limited and Servair Inc. (Respondent) *(Granted)*

3088-91-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. John Wheelwright Limited and Wheelwright Construction Inc. (Respondents) *(Granted)*

3153-91-R: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Two Star Drywall Company Ltd., Royalcrest Construction & Drywall Co. Ltd. (Respondents) *(Granted)*

3218-91-R: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Dayus Roofing Company Ltd., and Dayus Restorations Ltd. (Respondent) *(Withdrawn)*

3274-91-R: Christian Labour Association of Canada (Applicant) v. Versa-Care Limited, c.o.b. as Marsdale Senior Centre, and Second Avenue Lodge Inc. (Respondents) *(Granted)*

3303-91-R: Millwright District Council of Ontario on its own behalf and on behalf of its Local, Millwrights Local 1007 (Applicant) v. Dynamic Steel Inc. and, Dynamic Steel Fabricators Ltd. (Respondents) *(Granted)*

3371-91-R: United Steelworkers of America (Applicant) v. Alros Products Limited c.o.b. as Polytart Products; and Compass Plastics Limited (Respondents) *(Withdrawn)*

3560-91-R: International Brotherhood of Painters and Allied Trades, Local 1891, Tapers (Applicant) v. L-K Interior Contracting Inc., 754762 Ontario Inc. c.o.b. as Tri-County Contracting, and 666017 Ontario Limited (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

1648-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Cooper Corporation Limited and Versa Care Development Corporation (Respondent) *(Withdrawn)*

3219-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. T. Edison Electrical Enterprises Inc., Westview Electric Contractors Inc., Rudy Chiefari c.o.b. as Westview Electric Contractors (Respondents) *(Granted)*

0698-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Centrac Industries Limited and Centrac Inc. (Respondents) *(Withdrawn)*

1267-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 221 (Applicant) v. Lewin Kingston Division of Brousseau - Robidoux Enterprises Ltd., Regional Network Contractors Ltd. and ML Office Enterprises (Respondents) (*Dismissed*)

2608-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Bonik Incorporated and Serbecan Inc. (Respondents) (*Granted*)

2836-91-R: United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. J.P. Drywall, J.P. Acoustics (Kitchener) Inc., J.P. Acoustic and Drywall Ltd., J & P Drywall (Respondents) (*Withdrawn*)

2955-91-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. D'Angelo Plastering Company (1983) Ltd. and Frank Augusto Construction Ltd. (Respondents) (*Withdrawn*)

3066-91-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Acoustique Piche Inc. and Briefing Construction Inc. (Respondents) (*Granted*)

3068-91-R: Sheet Metal Workers' International Association Local Union 473 & Ontario Sheet Metal Workers' Conference (Applicant) v. Servair Limited and Servair Inc. (Respondents) (*Granted*)

3087-91-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. John Wheelwright Limited and Wheelwright Construction Inc. (Respondents) (*Withdrawn*)

3153-91-R: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Two Star Drywall Company Ltd., Royalcrest Construction & Drywall Co. Ltd. (Respondents) (*Granted*)

3218-91-R: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Dayus Roofing Company Ltd., and Dayus Restorations Ltd. (Respondents) (*Withdrawn*)

3302-91-R: Millwright District Council of Ontario on its own behalf and on behalf of its Local, Millwrights Local 1007 (Applicant) v. Dynamic Steel Fabricators Ltd. and Dynamic Steel Inc. (Respondents) (*Withdrawn*)

3560-91-R: International Brotherhood of Painters and Allied Trades, Local 1891, Tapers (Applicant) v. L-K Interior Contracting Inc., 754762 Ontario Inc. c.o.b. as Tri-County Contracting, and 666017 Ontario Limited (Respondents) (*Withdrawn*)

CROWN TRANSFER ACT

2760-91-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as Represented by the Ministry of Consumer and Commercial Relations (MCCR), Teranet Land Information Services Inc. (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2495-91-R: Gary Humeniuk (Applicant) v. IWA-Canada Local 2693 (Respondent) v. Taiga Trucking (Ontario) 1980 Inc. (Intervener)

Unit: "all employees of Taiga Trucking (Ontario) 1980 Inc. employed as truck and transport drivers at and out of the District of Thunder Bay, save and except foremen, persons above the rank of foreman" (12 employees in unit) (*Granted*)

Number of persons listed as eligible	12
Number of persons who cast ballots	8
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	5

2971-91-R: Heidi A. Bachellier (Applicant) v. United Food and Commercial Workers Union, Local 175 (AFL-CIO-CLC) (Respondent) v. Keve Services, carrying on business as First Choice Hair Cutters in the Town of Cobourg (Intervener) Unit: “all employees of Keve Services c.o.b. as First Choice Hair Cutters in the Town of Cobourg, Ontario, save and except assistant manager, persons above the rank of assistant manager” (4 employees in unit) (*Granted*)

Number of persons listed as eligible	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

3005-91-R: Employees of Geiger International Ltd. (Applicant) v. Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Respondent) v. Geiger International Ltd. (Intervener) (39 employees in unit) (*Dismissed*)

3051-91-R: Michael Thomas Muise (Applicant) v. Graphic Communications International Union Local 466 (Respondent) v. Dow Chemical Canada Inc. (Intervener)

Unit: “all its employees in its Metropolitan Toronto, Ontario Foam plant, save and except salaried foremen, office staff and technical staff in respect to rates of pay, wages, hours of work and working conditions.” (24 employees in unit) (*Dismissed*)

Number of persons listed as eligible	24
Number of persons who cast ballots	24
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	15

3102-91-R: K. Budsiak (Applicant) v. Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC-AFL-CIO) (Respondent) v. Polish Alliance Press Limited (Intervener)

Unit: “all employees of the employer, save and except general manager and editor-in-chief, those above the rank of manager and editor-in-chief, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (10 employees in unit) (*Dismissed*)

Number of persons listed as eligible	10
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	6

3168-91-R: Steven E. Davies and the members of CUPE Local 1932 (Applicant) v. Canadian Union of Public Employees (CUPE) (Respondent) v. Browning-Ferris Industries Limited (Intervener)

Unit: “all employees of Browning-Ferris Industries Limited at Carp, Ontario, save and except Assistant Service Manager, persons above the rank of Assistant Service Manager, office and clerical staff, dispatchers and all as set forth in a certain order of the Ontario Labour Relations Board dated April 2nd, 1975.” (22 employees in unit) (*Dismissed*)

Number of persons listed as eligible	22
Number of persons who cast ballots	22
Number of ballots marked in favour of respondent	16
Number of ballots marked against respondent	6

3222-91-R: Employees of T.C.C. Bottling Ltd., Chatham, Ontario carrying on business as Coca-Cola Bottling

(Applicant) v. Teamsters Local Union 938 (Respondent) v. T.C.C. Bottling Ltd., (carrying on business as Coca-Cola Bottling) (Intervener)

Unit: “all employees of T.C.C. Bottling Ltd., (carrying on business as Coca-Cola Bottling) working at or out of Chatham, Ontario, save and except Plant Supervisors, the Office Manager and persons above the rank of Supervisor or Office Manager” (21 employees in unit) (*Dismissed*)

Number of persons listed as eligible	21
Number of persons who cast ballots	21
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	15

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3655-91-U: The Corporation of the City of Cornwall (Applicant) v. Amalgamated Transit Union Local 946 and those individuals listed in schedule “A” (Respondent) (*Withdrawn*)

3673-91-U: The Corporation of the City of Cornwall (Applicant) v. Canadian Union of Public Employees Local 3251, and those individuals listed in Schedule “A” and Canadian Union of Public Employees Local 234, and those individuals listed in Schedule “A1” (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0755-90-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. Royal Homes Limited (Respondent) (*Granted*)

0978-90-U: United Brotherhood of Carpenters & Joiners of America Local 3054 and Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainants) v. Royal Homes Limited (Respondent) (*Granted*)

1004-90-U: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Toronto, Ontario, Local 128 (Complainant) v. Thermogenics Inc. (Respondent) (*Granted*)

2263-90-U: IWA-CANADA, Local 1-2995 (Complainant) v. Chapleau Forest Products Limited, Norman Lasante (Respondents) (*Withdrawn*)

2378-90-U: London and District Service Workers’ Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. St. Joseph’s Hospital, Sarnia (Respondent) (*Withdrawn*)

3192-90-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Centrac Industries Limited and Centrac Inc. (Respondents) (*Withdrawn*)

0511-91-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Centrac Industries Limited and Centrac Inc. (Respondents) (*Withdrawn*)

0558-91-U: London & District Service Workers’ Union, Local 220 (Complainant) v. St. Peter’s Seminary (Respondent) (*Withdrawn*)

0671-91-U: Detlef Dibowski (Complainant) v. Energy and Chemicals Workers Union Local #16 (Respondent) (*Dismissed*)

0779-91-U: Elaine Saarinen (Complainant) v. McKellar General Hospital (Respondent) v. Service Employees Union Local 268 Affiliated With The S.E.I.U. A.F. of L., C.I.O., and C.L.C. (Intervener) (*Dismissed*)

0780-91-U: Elaine Saarinen (Complainant) v. Service Employees Union Local 268 (Respondent) (*Dismissed*)

0984-91-U: Teamsters Local Union 938 (Complainant) v. Freightmaster (1990) Limited (Respondent) (*Withdrawn*)

1016-91-U: Ontario Nurses' Association (Complainant) v. Villa St. Joseph's Villa (Respondent) (*Withdrawn*)

1520-91-U: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Artset Forming and General Contracting and International Contractors Inc. (Respondents) (*Withdrawn*)

1888-91-U: The International Union of Bricklayers and Allied Craftsmen, Local 5 (Complainant) v. Vilar Construction Masonry Inc. and Alex Almeida Construction Limited (Respondents) (*Withdrawn*)

1889-91-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Vilar Construction Masonry Inc. and Alex Almeida Construction Limited (Respondents) (*Withdrawn*)

1912-91-U: Mr. Leonard Coulter (Complainant) v. Amalgamated Transit Union, Local 1573 (Respondent) v. Corporation of the City of Brampton (Intervener) (*Dismissed*)

1920-91-U: IWA-Canada, Local 2693 (Complainant) v. Field Lumber (1956) Limited (Respondent) (*Granted*)

2152-91-U: Canadian Union of Public Employees, Local 3419 (Complainant) v. Harrowood Seniors' Community (Respondent) (*Granted*)

2165-91-U: Mr. James C. Hutcheson (Complainant) v. Beatrice Foods (Ideal Division) (Respondent) (*Withdrawn*)

2349-91-U: Mr. Enzo Di Matteo (Complainant) v. Ms. Pat Pappas, Publisher, Ms. JoAnn Stevenson, Managing Editor; Ms. Paula Crowell, Editor, Markham Economist and Sun Newspaper (Respondents) (*Withdrawn*)

2523-91-U: United Brotherhood of Carpenters and Joiners of America (Complainant) v. Beaver Materials Handling Company Ltd. (Respondent) (*Withdrawn*)

2662-91-U: Margaret Alexander (Complainant) v. Esselte Pendaflex Canada Inc., Graphic Communications International Union, Local 466 (Respondents) (*Dismissed*)

2699-91-U: United Steelworkers of America (Complainant) v. Sani Mobile Ontario N.E. Inc. (Respondent) (*Withdrawn*)

2774-91-U: United Food and Commercial Workers International Union, Local 175 (Complainant) v. Food Warehouse (Respondent) (*Withdrawn*)

2802-91-U: Peter F. Howes, Tool & Diemaker (Job Code SHSZ) General Motors of Canada Ltd. Oshawa (Complainant) v. Local Union 222 C.A.W. And, the C.A.W. Plant Chairperson at General Motors in Oshawa, Thomas S. Hoar (Respondents) (*Withdrawn*)

2865-91-U: Arthur Kisslinger (Complainant) v. Canadian Auto Workers' Union Local 1520 (Respondent) (*Withdrawn*)

2871-91-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Complainant) v. Sketchley Cleaning Services Limited and Glen Homans and Robert Myhill (Respondents) (*Granted*)

2942-91-U; 3234-91-U: Canadian Paperworkers Union, Canadian Paperworkers Union, Local 1199 (Complainants) v. Macmillan Bathurst Inc. , IWA - Canada (Respondents) (*Withdrawn*)

2967-91-U: London & District Service Workers' Union Local 220 (Complainant) v. Cedarwood Village (Respondent) (*Withdrawn*)

- 2992-91-U:** Canadian Paperworkers Union and its Local 934 (Complainant) v. Domtar Inc. (Respondent) (*Granted*)
- 3004-91-U:** Beverley Mildred Walsh (Complainant) v. United Food & Commercial Workers International Union Local 175/633- Grievance Committee (Respondent) (*Withdrawn*)
- 3020-91-U:** Canadian Paperworkers Union and its Local 309 (Complainant) v. Domtar Inc. (Respondent) (*Granted*)
- 3052-91-U:** Abdulahi Malin Hassan (Complainant) v. Union of Food & Commercial Workers Locals 175/633 (Respondent) v. Budget Car Rentals Toronto Ltd. (Intervener) (*Dismissed*)
- 3071-91-U:** Kebba K. Jobatch (Complainant) v. Ottawa General Hospital and Canadian Union of Public Employees Local 1657 (Respondents) (*Withdrawn*)
- 3101-91-U:** Tool & Diemakers, (SHSZ), General Motors of Canada Ltd. (Complainants) v. Local Union 222 C.A.W., and the C.A.W. Plant Chairperson at General Motors in Oshawa, Thomas S. Hoar (Respondents) (*Withdrawn*)
- 3158-91-U:** The Ontario Public Service Employees Union (Complainant) v. Trenton and District Association for Community Living (Respondent) (*Withdrawn*)
- 3171-91-U:** Richard Cahill (Complainant) v. International Brotherhood of Painters & Allied Trades Local 1590 Ron Last Business Manager (Respondent) (*Withdrawn*)
- 3173-91-U:** Beverly A. O'Brien (Complainant) v. United Food & Commercial Workers, Local 114P, Canada Packers Inc. (Respondents) (*Withdrawn*)
- 3251-91-U:** Ontario District Council of the International Ladies Garment Workers Union Locals 14, 83 & 92 (Complainant) v. Beker Fashion Enterprises (Respondent) (*Withdrawn*)
- 3275-91-U:** Labourers' International Union of North America, Local 1059 (Complainant) v. Joe F. Canadian Masonry Ltd. (Respondent) (*Withdrawn*)
- 3276-91-U:** International Union of Bricklayers and Allied Craftsmen, Local 5 (Complainant) v. Joe F. Canadian Masonry Ltd. (Respondent) (*Withdrawn*)
- 3348-91-U:** Roxane Mackay (Complainant) v. Amalgamated Transit Union Local 1624 (Respondent) v. Trentway Wager Inc. (Intervener) (*Withdrawn*)
- 3362-91-U:** Philip E. Benham (Complainant) v. Graphic Communications Int. Union Local 691-S (Respondent) (*Withdrawn*)
- 3386-91-U:** Sonny Moran (Complainant) v. Independent Canadian Transit Union (Respondent) v. Grat War Memorial Hospital of Perth District (Intervener) (*Withdrawn*)
- 3395-91-U:** Labourers' International Union of North America, Local 1059 (Complainant) v. Vilar Construction Masonry Inc., Alex Almeida Construction Ltd., Alex Almeida, Canadian Building Materials Co. and Con Brosnon (Respondents) (*Withdrawn*)
- 3396-91-U:** International Union of Bricklayers and Allied Craftsmen, Local 5 (Complainant) v. Vilar Construction Masonry Inc., Alex Almeida Construction Ltd., Alex Almeida, Canadian Building Materials and Con Brosnon (Respondents) (*Withdrawn*)
- 3444-91-U:** Augusto MacPherson (Complainant) v. Labour International Union of North America (Local 506) (Respondent) (*Withdrawn*)

3471-91-U: Ian Blackie (Complainant) v. Canadian Textile & Chemical Union #501 and Harding Carpets (Respondents) (*Withdrawn*)

3476-91-U: Labourers International Union of North America, Ontario Provincial District Council (Complainant) v. Manny's Construction Limited (Respondent) (*Withdrawn*)

3559-91-U: International Association of Machinists and Aerospace Workers, Local Lodge 2243 (Complainant) v. Evergreen Door Inc. (Respondent) (*Withdrawn*)

3587-91-U: Local 8670, United Steelworkers of America, Gordon Bennett, Rocco Scazzariello, George Lawrie, Tom Altobello, Donald Doucette, Wayne Gulliver, Nelson Jackson, Edward Michalski, David Folland, Buddy Guy, Basil Brown, Bruce Foreshaw, Robert Hamilton, Jerome Macdonald (Complainants) v. Crown Cork & Seal Canada Inc. (Respondent) (*Withdrawn*)

3611-91-U: Sharon Elizabeth Nelson (Complainant) v. Ontario Nurses Association - Local 207 (Respondent) (*Withdrawn*)

3702-91-U: Willi K. Platte (Complainant) v. C W Henderson Cartage (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

3445-91-M: Christopher Chan (Applicant) v. The Society of Ontario Hydro Professional & Administrative Employees and Ontario Hydro (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3292-91-M: Canadian Linen Supply Co. Ltd., (Windsor Ontario) (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Dismissed*)

3480-91-M: Ridgewood Industries Ltd. (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Dismissed*)

3544-91-M: The Expositor (Employer) v. Brantford Typographical Union, Local 378 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

3104-90-JD: United Brotherhood of Carpenters and Joiners of America, Local 249 (Complainant) v. The Electrical Power Systems Construction Association, Sheet Metal Workers' International Association, Local 269, Cupido Construction (1989) Ltd. (Respondents) (*Withdrawn*)

1669-91-JD: Ontario Nurses' Association (Complainant) v. London and District Service Workers Union, Local 220 of the Service Employees International Union and Victoria Hospital Corporation (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3035-91-M: Christian Labour Association of Canada (Applicant) v. Versa-Care Limited, carrying on business as Marsdale Senior Centre (Respondent) (*Withdrawn*)

3542-91-M: The Heritage Nursing Home (Applicant) v. Ontario Nurses Association (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1148-91-OH: Walter S. McKinnon (Complainant) v. Drain Bros. Excavating Limited (Respondent) (*Withdrawn*)

3062-91-OH: Stephen Vanmeerbeek (Complainant) v. Santasalo North America Inc. (Respondent) (*Withdrawn*)

3454-91-OH: Dennis G Baranvik (Complainant) v. Gordin Trailers Sales and Rentals (Respondent) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

2966-91-U: Robert Pando (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1649-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Cooper Corporation Limited and Versa Care Development Corporation (Respondents) (*Withdrawn*)

2526-89-G: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Ellis-Don Limited (Respondent) (*Granted*)

1281-90-G: International Brotherhood Of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers And Helpers, Lodge 128 (Applicant) v. Ontario Hydro (Respondent) (*Dismissed*)

2084-90-G: Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association, Local 269 (Applicants) v. Electrical Power Systems Construction Association, Cupido Construction (1989) Ltd. (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 249 (Intervener) (*Withdrawn*)

3077-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. PCL Constructors Eastern Inc. (Respondent) (*Withdrawn*)

1268-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 221 (Applicant) v. Lewin Kingston Division of Brousseau - Robidoux Enterprises Ltd., Regional Network Contractors and ML Office Enterprises (Respondents) (*Dismissed*)

0702-91-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Margven Roofing Limited (sometimes carrying on business as M + S Roofing and Sheet Metal Ltd.) (Respondent) (*Granted*)

1344-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Anchor Shoring Limited (Respondent) (*Withdrawn*)

2426-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Fluor Daniel Canada, Inc. (Respondent) (*Withdrawn*)

2497-91-G: Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. CTM Ceramics International Inc. (Respondent) (*Withdrawn*)

2606-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Bonik Incorporated (Respondent) (*Granted*)

2643-91-G: Labourers International Union of North America Local 527 (Applicant) v. Coles Equipment Rentals a division of 924349 Ontario Ltd. (Respondent) (*Granted*)

2651-91-G: Resilient Floor Workers, Local 27 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Calibre Enterprises Ltd. (Respondent) (*Granted*)

2694-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Lewin Kingston Division of Brousseau - Robidoux Enterprises Ltd., Regional Network Contractors and ML Office Enterprises (Respondents) (*Dismissed*)

2754-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bay Concrete & Drain Inc. (Respondent) (*Granted*)

2761-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Cardon Enr. (Respondent) (*Granted*)

2820-91-G: Ontario Allied Construction Trades Council on behalf of Lake Ontario District Council United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Electrical Power Systems Construction Association, Ontario Hydro and, W.K.R.D. Utility Construction Inc. (Respondents) (*Withdrawn*)

2833-91-G; 3551-91-G: International brotherhood of Electrical Workers Local Union 353 (Applicant) v. S.H. Myles Company Ltd (Respondent) (*Granted*)

2837-91-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. J.P. Drywall, J.P. Acoustics (Kitchener) Inc., J.P. Acoustic and Drywall Ltd., J & P Drywall (Respondents) (*Withdrawn*)

2910-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Gjehub Mechanical Contractors Limited (Respondent) (*Granted*)

2919-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Twinborn Construction (Paving) Ltd. (Respondent) (*Granted*)

3032-91-G: Christian Labour Association of Canada (Applicant) v. Temp Tech Sheet Metal Limited (Respondent) (*Withdrawn*)

3041-91-G: International Union of Operating Engineers and it's Local 793 (Applicant) v. Matthews Pipelines Limited (Respondent) (*Withdrawn*)

3059-91-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Ellis Don Limited (Respondent) (*Withdrawn*)

3065-91-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Acoustique Piche Inc. (Respondent) (*Granted*)

3067-91-G: Sheet Metal Workers' International Association, Local Union 473 & Ontario Sheet Metal Workers' Conference (Applicant) v. Servair Limited and Servair Inc. (Respondents) (*Granted*)

3103-91-G: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. H. Griffiths company Limited (Respondent) (*Withdrawn*)

3142-91-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Ashland Drywall & Acoustics Ltd. (Respondent) (*Granted*)

3219-91-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Dayus Roofing Co. Ltd., Dayus Restorations Ltd. (Respondents) (*Granted*)

3255-91-G: The Ontario Allied Construction Trades Council, and the Labourers' International Union of

North America Local 1089 (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Withdrawn*)

3257-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 1988 (Applicant) v. Aubin Forming Enr. (Respondent) (*Granted*)

3286-91-G: United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Bird Construction Co. Ltd. (Respondent) (*Withdrawn*)

3304-91-G: Millwrights District Council of Ontario on its own behalf and on behalf of Millwrights Local 1007 (Applicant) v. Dynamic Steel Fabricators Ltd. and Dynamic Steel Inc. (Respondents) (*Granted*)

3350-91-G: Labourers' International Union of North America, Local 597 (Applicant) v. Greenspoon Brothers Limited (Respondent) (*Granted*)

3355-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Valley Interiors (Respondent) (*Granted*)

3356-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. J.R. Noel Plastering Ltd. (Respondent) (*Granted*)

3366-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canon Interior Contracting (Respondent) (*Withdrawn*)

3367-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Mainway Industrial Installations Inc. (Respondent) (*Granted*)

3376-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Twinborn Construction (Paving) Limited (Respondent) (*Granted*)

3377-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Sanvilla Gen. Constr. Ltd. (Respondent) (*Granted*)

3379-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dalv Construction Ltd. (Respondent) (*Granted*)

3380-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dawn Enterprises Ltd. (Respondent) (*Granted*)

3403-91-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Bondfield Construction Co. Ltd. (Respondent) (*Withdrawn*)

3406-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sera Construction Ltd. (Respondent) (*Withdrawn*)

3408-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. P A Richens Carpentry (Respondent) (*Withdrawn*)

3411-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. M.R.S. Finish Carpenters (Respondent) (*Withdrawn*)

3412-91-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Northwest Installations Inc. (Respondent) (*Granted*)

3420-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. C.W. West Crane Service Limited (Respondent) (*Granted*)

3421-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. R. L. Coolsaet of Canada Ltd. (Respondent) (*Withdrawn*)

3424-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bondfield Construction Company (1983) Limited (Respondent) (*Granted*)

3432-91-G; 3433-91-G: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pelbro Drywall Co. Ltd. (Respondent) (*Withdrawn*)

3438-91-G: International Brotherhood of Electrical Workers Local 353 (Applicant) v. Etobicoke Electrical Contractors Ltd. (Respondent) (*Granted*)

3440-91-G; 3441-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Huffman Bros. Welding Limited (Respondent) (*Granted*)

3442-91-G; 3443-91-G: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Coldmatic-Refrigeration of Canada Ltd. (Respondent) (*Granted*)

3449-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Starcip Forming Ltd. (Respondent) (*Withdrawn*)

3450-91-G: Christian Labour Association of Canada (Applicant) v. Stephens & Rankin Ltd. (Respondent) (*Withdrawn*)

3458-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Geddes Construction (Respondent) (*Granted*)

3483-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Olympia Excavating and Grading Co. Ltd. (Respondent) (*Granted*)

3484-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Rino Forming Limited (Respondent) (*Withdrawn*)

3495-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. 886916 Ontario Limited o.a. Clearwater Marine (Respondent) (*Granted*)

3498-91-G: Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. Iaboni Tile Limited (Respondent) (*Withdrawn*)

3527-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Oakcrest Floor Covering Inc. (Respondent) (*Granted*)

3532-91-G: International Brotherhood of Painters and Allied Trades Local 1795 Glaziers (Applicant) v. St. Catharines Glass & Mirror Ltd. (Respondent) (*Withdrawn*)

3550-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Security Electric (Respondent) (*Granted*)

3552-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. G.C. Tech Electrical (Respondent) (*Granted*)

3553-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric (Respondent) (*Withdrawn*)

3554-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Adelaide Electric Limited (Respondent) (*Withdrawn*)

3556-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Dram Electric (Respondent) (*Granted*)

3558-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Aries Electric (Respondent) (*Granted*)

3563-91-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. T.A.L. Metal Erectors Ltd. (Respondent) (*Granted*)

3586-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Inter-All Ltd. (Respondent) (*Granted*)

3588-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. Eric Fabricius, North Mechanical Ltd. (Respondents) (*Withdrawn*)

3605-91-G: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Consolidated Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

3636-91-G; 3638-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. J.P.C. Wrecking Ltd. (Respondent) (*Withdrawn*)

3643-91-G: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Allan Michaels Electric Ltd. (Respondent) (*Withdrawn*)

3650-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. General Construction Corp. (Respondent) (*Withdrawn*)

3690-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. 494582 Ontario Inc. (o/a as Deben Construction) (Respondent) (*Withdrawn*)

3743-91-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Viva Painting Company (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE SMOKING IN THE WORKPLACE ACT

3258-91-M: Diana Valsi (Applicant) v. The Sutton Group Skyway Realty Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0892-89-M: North York Public Library Board (Applicant) v. Canadian Union Of Public Employees, Local 771 (Respondent) (*Dismissed*)

3103-90-R: Practical Nurses Federation of Ontario (Applicant) v. The Mississauga Hospital (Respondent) v. Steelworkers of America (Intervener) (*Dismissed*)

0090-91-U: London And District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. 809950 Ontario Inc. c.o.b. as Pinehill Cottage (Respondent) (*Granted*)

0702-91-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Margven Roofing Limited (sometimes carrying on business as M + S Roofing and Sheet Metal Ltd.) (Respondent) (*Granted*)

1486-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ashbridge Electrical Contractors Limited (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

1846-91-R: United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of The

United States and Canada, Local Union 527 (Applicant) v. Ken Acton Plumbing & Heating Inc. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

3000-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Larry Warner Masonry Ltd. (Respondent) (*Dismissed*)

3583-91-R: Larry Warner Masonry Limited (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council and all other affiliated bargaining agents of the Labourers' International Union of North America, Ontario provincial District Council (Respondent) (*Dismissed*)

091290031

***Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4***

ISSN 0383-4778

SEP 23 1992

3 1761 11468005 1

